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IN THE

Supreme Court of the United States

No. 9[redacted]4 October Term 1927.

SANITARY REFRIGERATOR CO.,
Petitioner,

v.

ALEXANDER F. WINTERS and
BASIL R. CRAMPTON,
Respondents.

BRIEF FOR RESPONDENTS.

F. E. LIVERANCE, JR.,
JOHN BOYLE, JR.,
Grand Rapids, Michigan.,
Counsel for Respondents.

WEST MICHIGAN PRINTING CO., GRAND RAPIDS, MICH.

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BASIL R. CRAMPTON, RESPONDENTS

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

THE OPINIONS OF THE COURTS BELOW.

This case is before the Supreme Court of the United States because of diversity of opinion and conflict in decision on the part of the Circuit Courts of Appeals for the Seventh and the Third Circuits.

The conflict in decision is solely in respect to the matter of infringement of certain claims of United States Letters Patent No. 1,385,102, issued to the respondents on the 19th day of July, 1921 for a Latch. All courts which have had to pass upon the question are united in their findings that claims 1, 2, 3, 4 and 7 of the patent in question are valid.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 24 Fed. (2d) page 15.

The opinion of the Third Circuit Court of Appeals was handed down October 4, 1928 and at the time of writing this brief has not been published in any report. Copies thereof accompanied the petition for rehearing of the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit which was filed in the Supreme Court on October 11, 1928.

STATEMENT OF THE CASE.

The Latch of Patent No. 1,385,102.

The patent 1,385,102 is in the Record beginning page 72 and ending page 77. Five of the claims (Rec. pp. 76 and 77) are involved in the present cause and have numbers 1, 2, 3, 4, and 7.

The validity of the claims is not in question.

The sole question to be determined is whether or not the structure used by the petitioner on its refrigerators and sold with the refrigerators is an infringement of claims 1, 2, 3, 4 and 7 as found by the Circuit Court of Appeals for the Seventh Circuit.

The latch which is the subject matter of patent No. 1,385,102 and disclosed in the drawings (Rec. pp. 72 and 74) includes two parts, namely, a keeper structure permanently secured to the door jamb 2 of the refrigerator and a pivotally mounted latch lever structure permanently secured to the front face of the door adjacent its free vertical edge.

The keeper has a flat base 14 attached to the door jamb, an outwardly projecting post 15 and a substantially triangular shaped head 17 with two outer cam edges 18 and 19, the former at the upper outer side of the head and the latter at the lower side. The head depends below the post 16 and forms a hook open at its under side, the rear inclined edge 20 of the head being at one side of the recess of the hook into which one arm of the latch lever enters when the door is closed.

The pivoted lever construction attached to the door includes a supporting fixture having a flat base 3 secured to the door, an outwardly extending post 5 and an overhanging arm 6 spaced from and parallel to the base 3.

Between the base and the overhanging arm 6 the latch lever 7 is mounted for a swinging movement in a plane parallel to the front face of the door. The lever is pivoted between its ends on a pivot pin 8 and at one side of the pivot the lever is formed into an operating handle 11. At the other side of the pivot the lever provides a keeper engaging arm 9, hereafter referred to as the *first* arm. There is also a *second* arm 12 on the lever which projects laterally therefrom at the handle side of the pivot.

The lever is limited in movement to substantially a 90° swing. When the door is open the lever may occupy a horizontal position, in which case the handle side of the lever engages against the upper side of the post 5 to hold the lever horizontal. Equally well, the lever may occupy a vertical position, as in Fig. 4, in which case a side of the first arm 9 engages against the lower side of the post 5.

The opposite sides of the post 5 furnish stops, indicated at 5*a*, which limit the extent of swing of the lever in opposite directions and control its movements so that it must occupy either a vertical or horizontal position and yet may equally well occupy either position.

Should the lever be in its horizontal position when the door is open, closing the door brings the first arm 9 against the cam edge 19 of the keeper head and the inner cam side 10 of the arm rides against the edge or side 19 of the keeper automatically throwing the lever toward vertical position (as in Fig. 6, Rec. p. 74). The movement continues until the inner side of the second arm 12 strikes against the upper cam edge 18 of the head.

The upward swinging movement imparted to the lever is rapid under the momentum of the relatively heavy refrigerator door, and when the second arm 12 strikes against the edge 18 of the keeper head, the swinging movement of the lever is reversed and it is thrown back with considerable speed, bringing the first arm 9 under the hook of the keeper and wedging it against the inclined inner edge 20 of the keeper head. This is described in lines 37 to 54 inclusive, (Rec. p. 76).

If on the other hand the pivoted latch lever is in vertical position, closing the door brings the second arm 12 at its inner side 13 against the upper cam edge 18 of the keeper head and the lever is quickly swung in a clockwise direction and the first arm 9 brought into wedging engagement with the hook of the keeper, that is, back of the head and under the post 16 and wedged against the inner inclined side 20 of the keeper head. This is described in lines 17 to 27 (Rec. p. 76).

In either case, whether the lever be in its vertical position or horizontal position when the door is closed merely swinging the door to closed position causes an automatic wedging engagement of the first arm 9 of the lever with the keeper, and such wedging engagement is effected by the rapid swinging movement given to the lever whereby the keeper engaging first arm 9 wedges tightly against the inner inclined side 20 of the keeper head.

In opening the door the handle 11 is grasped and swung toward upper position. The lever usually stays in its upper vertical position. It however, is a free swinging lever and may accidentally fall to horizontal position or be knocked or brushed by the clothing to such position. Whatever may occur, closing the door automatically effects a tight latching without detriment to the latch, the door or the door jamb of the refrigerator.

Petitioner's Latch.

The latch used by the petitioner, and which has been held to infringe the patent owned by the respondents, is in substantial accordance with the disclosure of a certain patent to Schrader, No. 1,575,647, issued March 9, 1926. (Rec. pp. 156-159.)

Such latch likewise has a keeper structure for attachment to a refrigerator door jamb and a pivoted swinging latch structure for attachment to a refrigerator door adjacent its free vertical edge.

The keeper has a flat base b^1, an outwardly extending post terminating in a depending hook head, the outer edge of which, indicated at b^5, is a cam edge corresponding to the under outer cam edge 19 of the head of the patent in suit. Said hook at its inner edge is also in-

clined upwardly as indicated at b^4 (Fig. 3, Rec. p. 156) corresponding to the inner inclined edge 20 of the patent in suit. The keeper at the side thereof adjacent the door has a laterally projecting pin b^8 with a cam side b^9.

The pivoted swinging lever structure includes a permanent fixture having a base c^3 secured to the front side of the door, an outwardly extending post and an overhanging arm c^4 parallel to the base. The latch lever is pivotally mounted between its ends on this fixture, lying between the base and overhanging arm and swinging on a pivot c^2. At one side of the post the lever is formed into a handle c^5 and at the other side into a keeper engaging or *first* arm c^7. Extending laterally from the lever at the handle side of the pivot is a cam c^1, which in the patent (Rec. p. 156, Fig. 4) is of arcuate form.

The actual latch used by the Sanitary Refrigerator Company is slightly different in design from that disclosed in the Schrader patent, the inclined cam c^1 of the patent being substantially a straight inclined or oblique cam and not arcuate as shown, while the design of the head of the keeper much more closely approximates the design of the patent owned by respondents in shape and form. The action, however, is not changed in any respect.

The latch lever in the latch used by the petitioner has a free swinging movement in a plane parallel to the face of the refrigerator door, is stopped when the handle engages against the upper side of the outstanding post on which the lever is mounted, or when it is in horizontal position; and is stopped when swung in the other direction by the keeper engaging arm c^7 coming against the opposite side of the same post. The lever freely swings

through this arc of 90° between its vertical and its horizontal positions and may equally well occupy either position, and is quite as liable to occupy one position as the other when the door is opened.

If the latch lever should be in horizontal position when the door is open, closing the door causes the inner side of the arm c^7 to ride against the outer edge b^5 of the keeper head, throwing the lever upwardly toward vertical position until the inclined cam c^1 strikes the pin b^8 whereupon the movement of the lever is reversed and it is swung back with considerable speed and momentum to bring the keeper engaging arm c^7 into operative wedging engagement with the inner inclined side b^4 of the keeper hook; exactly as with respondents' latch.

If, on the other hand, the latch lever is in vertical position, closing the door brings the cam c^1 against the cam side b^9 of pin b^8 and the lever is quickly swung in a clockwise direction and brings the keeper engaging arm c^7 into operative wedging connection with the keeper hook.

Exhibits of the latch in suit owned by Winters & Crampton and of the latch used by the petitioner, Sanitary Refrigerator Company are before the court. Plaintiffs' Exhibit No. 2 is a mounted latch device built exactly in accordance with the disclosure of patent No. 1,385,102 in suit. Plaintiffs' Exhibit No. 3 is a mounted latch used by the Sanitary Refrigerator Company, substantially in accordance with the disclosure of the Schrader patent (Rec. p. 156) with such variations in design as have been noted.

ARGUMENT.

Summary of Points.

Point A. There is identity between the patent in suit and the latch used by the petitioner; in function and result, in principle of operation and in essential structure.

There is substantial identity in the physical structure of the latch of the patent in suit and the latch used by petitioner notwithstanding a reversal of parts, wherein the second arm on the lever of the patent in suit has been reversed to the keeper in the latch used by petitioner, and the cam cooperating therewith at the upper outer edge of the keeper of the patent in suit has been reversed to the lever in the latch used by petitioner. Such mere reversal is an alteration in form only and is identity in the sense of the patent law.

Union Paper Bag Mac. Co., et al. vs. Merrick Murphy, et al., 97 U. S. 120; 24 L. Ed. 935.

Hoyt vs. Horn, 145 U. S., 302; 36 L. Ed. 713; 12 Sup. Ct. 922.

Devlin, et al., vs. Paynter, et al., 64 Fed. 398.

Anchor Cap & Closure Corp., vs. Prichard, 232 Fed. 156.

Crown Cork & Seal Co. vs. Aluminum Stopper Co., 108 Fed. 845.

Walker on Patents, 5th Ed., Sec. 348, page 432.

Columbia Wire Co. vs. Kokomo Steel & Wire Co., 143 Fed. 116.

Walker vs. Giles, et al., 218 Fed. 637.

Simplex Window Co. vs. Hauser Reversible Window Co., 248 Fed. 919.

Telescope Cot & Bed Co. vs. Gold Medal Camp Furniture Mfg. Co., 229 Fed. 1002.
Pittsburgh Water Heater Co. vs. Beler Water Heater Co., 228 Fed. 674.

Point B. Whether a pioneer or an improvement patent, a meritorious patent is entitled to liberal treatment and to the application of the rule "ut res magis valeat quam pereat."

Eibel Process Co. vs. Minnesota & Ontario Paper Co., 261 U. S. 45; 43 Sup. Ct. 322.

Point C. The improvement in latches defined in claims 1, 2, 3, 4 and 7 of respondents' patent in suit is meritorious as evidenced by its immediate acceptance, large sales and substantial supplanting of other springless pivoted lever refrigerator latches and, as such, is entitled to a liberal construction and a forbidding of appropriation thereof by an infringer who copies the whole substance of the invention.

Eibel Process Co. vs. Minnesota & Ontario Paper Co., 261 U. S. 45; 43 Sup. Ct. 322.
Temco Electric Motor Co. vs. Apco Mfg. Co., 48 Sup. Ct. 170.

Point D. The claims 1, 2, 3, 4 and 7 of the patent in suit are not limited so as to require any construction holding said patent in suit to the exact specific structure illustrated in the drawings and described in the specification. There has been no abandonment of any part of the invention by reason of failure to claim the same.

Point E. The prior patents and the earlier structures relied upon by the petitioner do not have the invention of the patent in suit and do not necessitate a construction of the claims 1, 2, 3, 4 and 7 of said patent to limit the invention to a point which will permit the petitioner to appropriate all of the advantages of the invention thru a mere formal alteration of structure involving a mere reversal of one stationary and one fixed part without changing, in any way what the respondents first invented.

Point F. That the latch structure used by the petitioner is made under a subsequent patent is immaterial to the question of infringement. One who obtains a later patent cannot appropriate and infringe an earlier dominating patent of another without license.

Hoyt vs. Horne, Supra.
Temco Electric Motor Co. vs. Apco Mfg. Co., Supra.
Cochrane vs. Deener, 94 U. S. 780; 24 L. Ed. 139.
Cantrell vs. Wallick, 117 U. S. 689; 29 L. Ed. 1017.
Herman vs. Youngstown Car Mfg. Co. (C. C. A. 6th), 191 Fed. 579.
Yancey vs. Enright, C. C. A., 230 Fed. 641.
French vs. Buckeye Iron & Brass Wks., C. C. A. 6th; 10 Fed. (2d) 257.

Point A.

The patented latch uses a fixture attached to the door, including a base, an outwardly extending post and a laterally overhanging arm parallel to the base. The latch used by petitioner has a like fixture identical in every

respect. The patented latch has a lever pivotally mounted between its ends, formed into an operating handle at one side of the pivot and a keeper engaging arm at the opposite side of the pivot. The latch used by petitioner has a like lever with the same handle and keeper engaging arm pivotally mounted in a like manner between the base and overhanging arm of the fixture. In both, the lever swings freely through a 90° arc in a plane parallel to the front of the door, is stopped by the handle engaging the upper side of the post of the fixture when the lever is horizontal and by the keeper engaging arm striking against the opposite side of the post of the fixture when the lever is vertical. The keeper in both the patent in suit and the latch used by petitioner has a base, an outwardly extending post, and a head depending from the outer end of the post forming a hook for the keeper engaging arm; and the lower outer edge of the keeper head in both is a curved cam against which the keeper engaging arm of the lever strikes when the door is moved to closed position with the lever horizontal.

The physical identity described so far is exact and unchanged in any respect.

The latch lever of the patent in suit has a second arm projecting laterally therefrom and the keeper has a cooperating cam at the upper outer edge of the keeper head. In the latch used by the petitioner a pin projects laterally from the side of the head toward the latch lever and an inclined cam to cooperate therewith projects laterally from the side of the lever.

There has been a transfer of the second arm of the lever of the patent in suit to the keeper, and a transfer

of the cam cooperating therewith from the keeper to the lever, in the latch used by petitioner.

The accompanying drawing illustrates the latch of the patent in suit under the heading, "Plaintiffs' Latch" and the latch used by the petitioner under the heading, "Defendant's Latch." In plaintiffs' latch a second arm is noted projecting laterally from the latch lever and the inclined oblique cam at the upper outer edge of the head of the keeper is illustrated in solid black. In defendant's latch the inclined oblique cam has been reversed or transferred to the lever and the second arm has been reversed or transposed to the keeper.

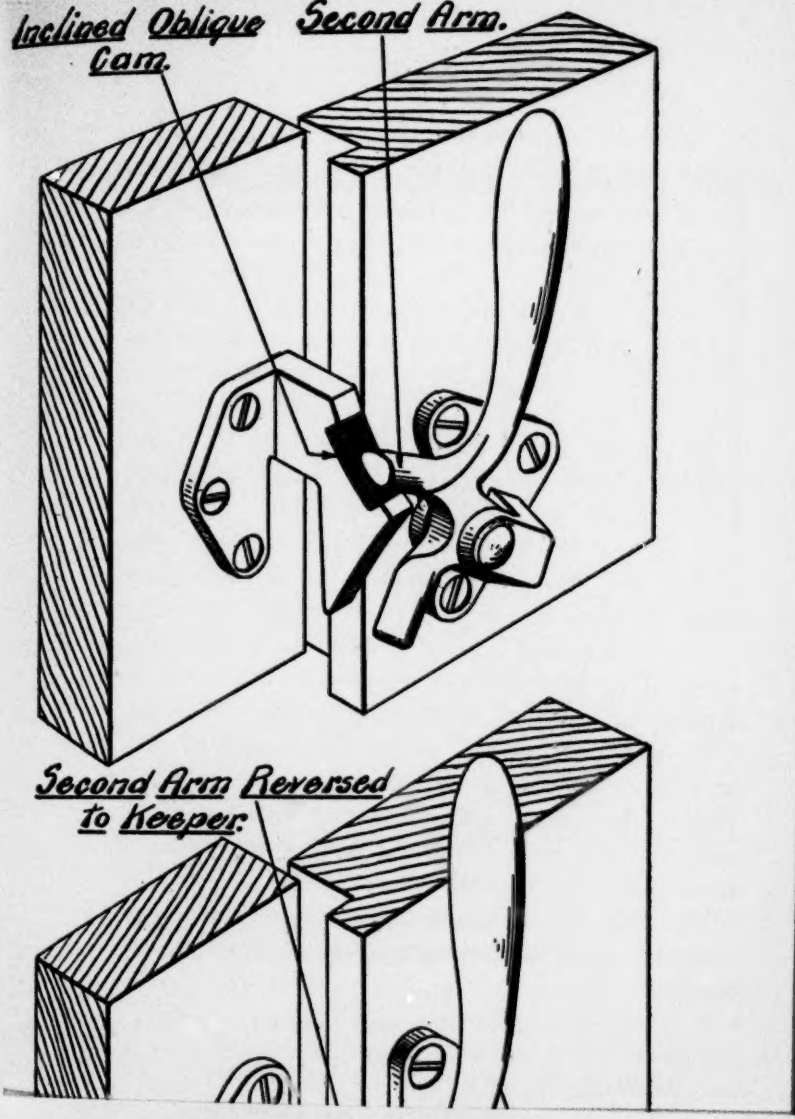
This, it is contended, is the merest alteration in form and reversal of parts that can be done and when it is attempted it is held to be infringement under the principles of the Union Paper Bag Machine Co., et al., vs. Merrick Murphy, et al., Supra.

The patent in the case of Union Paper Bag Machine Co., et al., vs. Merrick Murphy, et al., was concerned with a paper bag making machine. Paper bag making machines were very old, or as the opinion of the Supreme Court says:

> "Machines for making paper bags are old, as both sides admit; and the evidence in this case shows that they have been constructed by many persons and in various forms for more than twenty years, and with more or less utility. Neither party, in this case, claims to be the original and first inventor of an entire machine of the kind; nor could such a claim, if made, be sustained, in view of the admitted state of the art."

The matter which was in issue in this case related to the mechanism for cutting the paper. In the patent the

Plaintiffs' Latch



cutter was movable, was lifted vertically, and descended by its own weight. The paper was passed over a stationary striker and when the cutter dropped by its weight the paper was cut. In the charged infringing machine the knife was stationary under the paper, a weight in the form of a straight piece of metal was lifted and then thrown downward sharply to make a vertical blow upon the paper and cause the knife to cut the paper as effectively as the cutter did in the machine of the patent. That is, a knife and a striker were used in both machines. In the patent the striker was stationary, the paper was over it, and the knife dropped and moved against the striker with the paper between. In the infringing machine the knife was stationary, the paper over it and the striker was moved against it with the paper between, a reversal in position and movement of the knife and striker but with an attainment of the same result in both cases. There was relative movement of the knife and striker in both cases though in one case, that of the patent, the striker was stationary and the knife movable, while in the infringing machine the knife was stationary and the striker was movable.

The Supreme Court found that these two machines were identical in the sense of the patent law holding that:

> "Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and

> to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result * * *."

In the present case, in the patent No. 1,385,102, the second arm (numbered 12, Rec. p. 74) is on the movable lever and moves with it. The cooperating inclined or oblique cam 18 is on the keeper head and is stationary. In the latch used by the petitioner the second arm is on the keeper head and is stationary, being what is called the pin b^8 in the Schrader patent, No. 1,575,647 (Rec. p. 156). The cooperating cam c^1 is on the lever and is movable with it. The pin b^8 and the cam c^1 of the latch structure shown Rec. p. 156 work together, cooperate together, serve exactly the same functions, no more and no less than the arm 12 and the cam edge 18 of the structure of the patent in suit shown Rec. p. 74. There has been the same type of alteration in form of the latch patent in suit by the infringer in this case as was done by the infringer in the Union Paper Bag Machine Co. case; and in the sense of the patent law they are the same thing, doing the same work in the same way and accomplishing the same result.

This exact equivalent and, therefore, identity in the sense of the patent law is set forth first in this brief for the reason that it will obviate the necessity for any further consideration of the case. The claims 1, 2, 3, 4 and 7 are valid. Both trial courts and appeal courts found them so. If there is this complete identity in the sense of the patent law as set forth by the Supreme Court case cited, it is immaterial whether the construction of the claims be broad, narrow or otherwise for no matter

how narrow a construction or interpretation be given, complete identity of a charged infringing structure with the patented structure in the sense of the patent law necessarily proves infringement of even the narrowest claim that a patent may have, or of any claim under the narrowest construction and interpretation that is given to it. One of the lower courts, that of the Southern District of New York, in Anchor Cap & Closure Corp. vs. Prichard, supra, by Judge Learned Hand, now judge of the Circuit Court of Appeals for the Second District, on page 160 of 232 Fed. in treating patent No. 874,201, discussed the structure of the defendant's machine therein, called attention to the reversal of parts of the machine of the patent in suit, called attention to the prior art, and concluded:

> "It is quite possible that the scope of the patent must be held *strictly to the disclosure* itself; but that question is academic here for the defendant has copied the machine faithfully except for the *mere reversal of the parts.*" (Italics ours.)

In Crown Cork & Seal Co. vs. Aluminum Stopper Co., Supra, on page 866 of 108 Fed., the Circuit Court of Appeals for the Fourth Circuit said:

> "The court will look through the disguises, however ingenious, to see whether the inventive idea of the patentee has been appropriated, and whether the defendant's device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement." (Citing Clough vs. Gilbert & Barker Mfg. Co., 106 U. S. 164, 27 L. Ed. 134; and same, 106 U. S. 178, 27 L. Ed. 138.)

Section 348, p. 432, Walker on Patents, 5th Ed., says:

> "Changing the relative positions of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before." (Citing ten supporting cases.)

In Columbia Wire Co. vs. Kokomo Steel & Wire Co., 143 Fed., on page 122, the Court of Appeals for the Seventh Circuit said:

> "We are of the opinion that the means thus transposed in the appellee's machine, if not within the definition of colorable evasion which infringe the patent in any view of its scope, are plain appropriations of the essence of the Bates conception by equivalent means, and infringements of the patents within the well settled rule referred to. All the elements of the patent combination are employed with substantial identity in their use, and departure appears from the letter of the claims only in the arrangement of these elements, without substantial difference in the principle of operation. The policy and rules of the patent law require that the patentee be protected against such evasion of a wording of the claim in form or non-essential details when the substance of the invention is thus used and is unmistakably shown in the specification and claims. (Citing six supporting cases of the Supreme Court and one by a Circuit Court of Appeals.")

In Walker vs. Giles, et al., 218 Fed., on page 638, the Court of Appeals for the Second Circuit said:

> "The only change of organizations which defendant has made is the placing of the flange, which acts to hold the hub in place, on the gear rack instead of on the hub. In one case the flange rests on the teeth of the gear rack; in the other the teeth of the hub

rest on the flange. This is a mere reversal of parts, and under well settled principles will not avoid infringement."

In Simplex Window Co. vs. Hauser Reversible Window Co., 248 Fed., on page 926, the Circuit Court of Appeals for the Ninth Circuit said:

"It is apparent, from a comparison of the two devices, that they both produce the same result. The real question is: Do they do so by substantially the same means? It is needless to cite the numerous cases in support of the law clearly stated in section 348 of Walker on Patents, the substance of which is that changing the relative position of the parts of a machine does not avert infringement, where the parts transformed perform the same respective functions after the change as before, but that such change does do so where the changing of those positions so changes the functions of the parts that the machine acquires a substantially different mode of operation, even though the ultimate result remains the same."

In Telescope Cot & Bed Co. vs. Gold Medal Camp Furniture Mfg. Co., 229 Fed., the Court of Appeals for the Second Circuit, on page 1004, said:

"Infringement seems too clear for discussion. In the Herman cot the slots are in the braces and the pins are on the brackets connected to the legs. In defendant's cot the slots are in the brackets and the pins are on the braces. It is wholly immaterial on which parts of the combination the slots and pins are respectively located so long as they function alike in both structures; this they do because defendant's slots in the brackets are so located that the play of the pins therein is in the same direction as the length of the braces. The amount of this longitudinal play is slightly less in defendant's structure because the slots are somewhat shorter, but they are long enough

> to secure a substantial longitudinal play. Infringement may be found although the infringing device does not obtain the advantages of the invention to the fullest extent."

In Pittsburgh Water Heater Co. vs. Beler Water Heater Co., 228 Fed., the Court of Appeals for the Third Circuit, on page 677, said:

> "That mere departure or reversal in order and form, while identity or principle, process, or result are retained, will not serve to avoid infringement, is a fundamental principle of patent law that needs no supporting citations."

In Devlin vs. Paynter, et al., 64 Fed. 398 (3rd C. C. A.), the Second Syllabus says:

> "A union for steam pipes, consisting of a head member having a seat of soft metal with a concave face, and a tail member having a convex face, is infringed by a union which differs only in the facts that the convex face is on the head member and the concave face is on the tail member, and that the soft metal is on the convex face instead of on the concave face."

The various cases cited of the Circuit Courts of Appeals are decisions of courts of final resort in patent matters and beyond which, as soon as the establishment of Circuit Courts of Appeals took place, a patent case seldom went. Changes in relative position of parts, without departure from the invention and the principle of operation thereof, which do not break up the combination and make a new combination with a greater or less number of elements in the combination than are defined in the claims of a patent which is charged infringed, and particularly where there is a mere reversal of two cooperating parts in a combination structure, does not

avoid infringement and has been universally so held by all courts of last resort. This principle of law as stated by the Third Circuit Court of Appeals is so well settled as to require no supporting citation.

The question then resolves itself down to whether or not the latch used by the petitioner consists merely of a reversal of the inclined or oblique cam, at the upper outer edge of the keeper head in respondents' patent, to the lever, and a reversal of the second arm from the lever to the keeper; or whether there was something more than this done so as to obtain the results in a different manner and in accordance with a different principle.

The cooperation of the second arm on the lever of respondents' patent in suit and the upper outer cam edge of the keeper head takes place in opening the door and also in closing the door when the lever is in its vertical position. In opening the door the inner side of said second arm rides on the outer surface of the cam edge 18 of the keeper head, prying the door open, if for any reason it is tight or sticks, as many times happens with refrigerators, due to swelling because of moisture.

In the latch used by the Sanitary Refrigerator Company the inner side of the inclined oblique cam, which has been transferred to the lever, rides against the outer side of the lug or second arm on the keeper which has been transferred from it to the lever and the door is opened, even though it should stick, by reason of the wedging cam action between the cam on the lever and the lug or pin, or second arm (or whatever it may be called) on the keeper in exactly the same way and with exactly the same pivotal movement imparted to the lever.

In closing the door with the latch structure of respon-

dents' patent with the lever in vertical position, the inner side of the second arm strikes and rides against the upper outer edge 19 of the keeper head with an automatic turning of the lever in a clockwise direction into engagement with the keeper hook. With the latch used by the petitioner the inner side of the inclined oblique cam which has been transferred from the keeper to the lever strikes and rides against the upper outer side of the second arm which has been transferred to the keeper, with a like automatic clockwise movement of the lever into engagement with the hook of the keeper.

There has been no new combination made by this mere reversal of one stationary and one movable part which in their reversed positions cooperate in the same way by having the same relative movements with respect to each other. This is the kind of change in the relative position of the parts of a machine meant in the first sentence of the first paragraph of Section 348 of Walker on Patents, where the change in relative position in no way affects the respective functions of the parts which have been changed. It is not a change like that referred to in the second paragraph of Section 348 of Walker on Patents, where the changing has so changed the functions of the parts that the machine acquires a substantially different mode of operation.

The modes of operation of the latch of the patent in suit and of the latch used by the petitioner are identical in every respect. There has been no change in function and the only thing that can be said, and which was urged before the Circuit Courts of Appeals for both the Third and Seventh Circuits, namely, that the location of the inclined oblique cam on the latch used by petitioner is

closer to the pivot of the lever than is the second arm in the latch of the patent, while the lug or reversed second arm on the keeper head is located inward from the outer upper edge of said keeper head, thereby making a closer coupling of the two cooperating parts (the second arm and the inclined cam), is merely a slight change in the leverage and makes only a slight difference in degree of the force which may be secured in opening a door which sticks, though the way that the door is pried open remains exactly the same.

Most rearrangements and reorganizations of elements which make a new invention, in fact, it is believed all of such reorganizations and rearrangements which really make a new combination are reorganizations and rearrangements which go far beyond merely reversing two co-operating parts, one of which is stationary in the device of the patent and the other of which is movable, while in the charged infringing device the stationary and movable parts have been merely reversed. Mere reversal, of this kind has always been, it is submitted, considered identity in the sense of the patent law irrespective of how strict a construction is made of the claims of a patent. For the question of the breadth or scope of the patent becomes merely academic as Judge Hand has said, where there has been a faithful copying of the patented mechanism except for such mere reversal; because, in fact, in such cases, in the sense of the patent law, there is absolute and complete identity which will bring the infringing article within the scope of any valid claim of the patent whatever its construction may be.

Point B.

Patent No. 1,385,102 is not a pioneer refrigerator latch patent. Refrigerator latches in many forms had been made for many years before. Latches had been attached to doors and keepers to door jams, or the keepers to the doors and the latch structures cooperating therewith to the door jambs. The improvement made by the respondents herein, while not of a pioneer character, was nevertheless a very meritorious and practical improvement. It is entitled to a construction, if possible, which will give effect to the patent rather than destroy it; and a patent does not have to be a pioneer nor one making a long step in advance in the art in order to be entitled to liberal treatment if, in fact, the invention which has been made is meritorious.

The Supreme Court has recently so stated in Eibel Process Co. vs. Minnesota & Ontario Paper Co., Supra, as follows, on page 328, 43 Sup. Ct. Reporter:

> "In administering the patent law, the court first looks into the art, to find what the real merit of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves. If what he has done works only a slight step forward, and that which he says is a discovery is on the border line between mere mechanical change and real invention, then his patent, if sustained, will be given a narrow scope, and infringement will be found only in approximate copies of the new device. It is this differing attitude of the courts toward genuine discoveries and slight improvements that reconciles the sometimes apparently conflicting instances of construing specifications and the finding of equivalents in alleged infringements. In the case

before us, for the reasons we have already reviewed, we think that Eibel made a very useful discovery, which has substantially advanced the art. His was not a pioneer patent, creating a new art; but a patent which is only an improvement on an old machine may be very meritorious, and entitled to liberal treatment. Indeed, when one notes the crude working of machines of famous pioneer inventions and discoveries, and compares them with the modern machines and processes exemplifying the principle of the pioneer discovery, one hesitates in the division of credit between the original inventor and the improvers, and certainly finds no reason to withhold from the really meritorious improver, the application of the rule 'ut res magis valeat quam pereat,' which has been sustained in so many cases in this court. Winans vs. Denmead, 15 How. 338, 341, 14 L. Ed. 717; Corning vs. Burden, 15 How. 265, 269, 14 L. Ed. 683; Turrill vs. Railroad Co., 1 Wall. 491, 510, 17 L. Ed. 668; Rubber Co. vs. Goodyear, 9 Wall. 788, 795, 19 L. Ed. 566; McClain vs. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800."

Point C.

The automatic swinging lever latch structure disclosed in the patent 1,385,102 in suit, is one of merit and one which when it was produced was immediately sold in large quantities. Mr. Crampton, one of the inventors, states the success attending the latch as soon as it was developed. This appears Rec. pp. 10 and 11. It was sold to many of the refrigerator companies. Ninety per cent of the commercial refrigerators, grocery stores, hotels and butcher shops use the latch, and the company with which Winters and Crampton are associated sells this latch to all the commercial refrigerator companies except two or three. The latch is also sold to several household refrigerator companies. Over two million latches under

the patent in suit had been sold since the latch was developed at the time the testimony of Crampton was taken, and ninety per cent of the commercial refrigerator manufacturers use the particular latch of the patent in suit.

The latch was immediately accepted, sold in large quantities, must have taken the place of the latches previously used on ninety per cent of the commercial refrigerators, supplanting and superseding them, and as such, it is contended, is entitled to a liberal treatment by the courts, and the patent thereon not be emasculated by any construction which will destroy and not give effect to the grant. Particularly, the complete appropriation of all of the substance and value and actual structure devised by the owners of the patent in suit herein should be forbidden the petitioner herein, where an attempted evasion of the patent has been made but with complete appropriation of the same, such alterations in construction as were made being formal, but utilizing exactly the same elements in combination, working in the same way to produce the same result.

The Supreme Court very recently in Temco Electric Motor Co. vs. Apco Mfg. Co., supra, dealing with a patent which was not a pioneer, was affected in its decision by the way in which the public eagerly took the device of the patent involved and its marked success. When an art is very old, and is full of earlier structures patented and otherwise which have been used for years to fulfill a certain want, then when someone comes along and perfects a different structure in the same art and occupying the same field, which renders prior constructions, used for years, practically obsolete, it is very weighty evidence of an invention of exceptional merit. An invention of

the kind which obsoletes other structures which have been practically used for many years and which previously have been the best of their kind is entitled, it is contended, to as liberal a treatment as many first inventions in a field.

In the present case the respondents' invention made practically obsolete the so-called Condit lever described in the first paragraph (Rec. p. 75) of the patent in suit. This description of the Condit latch begins with line 13 of the first column on Rec. p. 75. A Condit latch of the swinging lever type, on the market when respondents' latch was produced, is before the court in the defendant's exhibit, 1914 latch; and the Charles patent No. 702,185. (Rec. p. 100 Etseq.) is the forerunner of the automatic Condit latch which was on the market and sold in large quantities when the respondents' latch was perfected the last of 1920. It is open for all refrigerator manufacturers to make. Its principle objection, and the one which the latch invented by respondents overcame, is that when it drops to a horizontal position with the door open it extends partly across the door opening, whereby closing the door brings the inside of the door against the latch lever with detriment either to the latch or door or both, or breaking the latch loose from its attachment to the door jamb, probably all three occurring in most instances.

If respondents had made no meritorious advance there would be no infringement with the many other old latches available and free for use. It is submitted that it does not come with very good grace from any infringer to claim there has been either no improvement or at least one of infinitesimal character, that the latch of the patent

is no better than those previously used, yet at the same time cling stubbornly to the new patented latch and not use the old. Or as was said by the Court of Appeals for the Eighth Circuit in Griswold vs. Harker, et al., 62 Fed. 389, on page 393:

> "Actions often speak louder, and frequently more truthfully, than words. It is not impossible that the reason why the appellees are not using the old devices they plead is that the improvements described in this patent have made them useless and unmerchantable. If this is not so, they can abandon the improvements of Selden and Griswold, and go back to the devices they plead."

Point D.

The claims 1, 2, 3, 4 and 7 (Rec. pp. 76-77) are not of the same scope. Claims 1 and 2 specifically define the structure illustrated in the drawings of the patent. The keeper is defined specifically. The fixture or member on which the lever is mounted is defined specifically in its three elements, "a base, an integral outstanding post projected from the base and a laterally extending arm at the upper end of the post, parallel with the base." The latch lever in its specific form is defined. These two claims are, it is contended, infringed for the reason that while the latch used by the petitioner does not correspond literally to the wording of claims 1 and 2, such avoidance of the literal wording of the claims is effected by the petitioner by merely reversing or transposing two of the parts, one on the keeper and one on the lever, to the lever and keeper, respectively. Or as said before, the second arm on the lever has been transposed to the keeper and the cam on the keeper which cooperated

therewith has been transferred from the keeper to the lever without changing or disturbing their cooperative action. Otherwise there is physical and literal identity and this mere transposition with an avoidance of the literal wording of the claims does not disturb the identity of the patented structure and the charged infringing structure in the least, in the sense of the patent law.

The next most specific claims is claim 7. The keeper is defined as attached to the casing. The lever is defined as pivotally mounted on the door *between its ends*. One end of the lever is formed into an operating handle and the other into a keeper engaging arm. A second arm projects from the handle portion of the lever a short distance from the pivot at an angle to the first arm. A keeper is defined as formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed. This automatically operates the lever so that it will engage under the keeper when the door is entirely closed no matter what the position of the lever.

With respect to this claim also there has been direct transposition of two parts by the petitioner, which in their transposed or reversed state co-act and cooperate in exactly the same manner as before. The Court of Appeals of the Seventh Circuit found further that from a literal standpoint the laterally extending or oblique cam on the latch used by the petitioner was the "second arm" defined in the claims and that the upper side of the lug projecting from the side of the head of the keeper was the side of the head against which the said "arm" engaged, cooperating in the same way as the second arm

of respondents' latch and the upper outer side 19 of the keeper head.

In the same way with respect to claim 4, the laterally extending oblique cam member of the petitioner's latch was considered by the Seventh Circuit Court of Appeals as the "second arm" on the lever, the upper outer side of the lug being the *upper outer side* of the keeper head in the sense of the patent.

While from the strict physical standpoint the latch which the petitioner uses is the latch of the patent in suit with a physical transposition of the second arm and the cooperating cam from latch lever to keeper and from the keeper to latch lever, respectively, inasmuch as the cooperative action of the keeper and lever is brought about by the engagement of two cam surfaces against each other, the treatment and construction given these claims by the Court of Appeals for the Seventh Circuit is logical for the reason that the reversal or transposition of parts which has been pointed out necessarily involves a reversal of two cam members; and even after the reversal is made there is not only identity in the patent sense because of such reversal but there is also identity in literal application of the terms of claims 4 and 7 because in a great many respects the two parts which were reversed or transposed have common structure, particularly with respect to the two cooperating cam surfaces.

Claim 3 broadly defines a means on the keeper and a means on the latch lever to engage with the keeper on the outer sides thereof to swing the lever into engagement with the keeper at the inner side thereof when the door is closed with the lever occupying either a horizontal or vertical position.

Claim 3 as well as claims 4 and 7, clearly is not limited in any respect by the language used to a word picture of the drawing of the patent in suit. Like most patents which have any scope at all there are several claims to the invention. In this case claims 1, 2, 3, 4 and 7 vary considerably in the terms used to define the invention. Claim 3 is of greatest breadth, claims 1 and 2 are the narrowest, claims 4 and 7 occupy an intermediate position. Abandonment by failure to claim is not present for if this was so, there would be such limitations in each and every claim that the petitioner or anyone else could leave out an element or elements of any combination defined and not substitute an equivalent therefor; or in its transposition and reversal of parts could dispense with an element or elements of the combinations defined and thus avoid infringement, as in McLain vs. Ortmayer, 141 U. S. 419, 35 L. E. 800, wherein infringement was avoided by omitting a distinctly claimed element of the combination and not substituting any equivalent to take its place. In the present case every element of the combinations defined in each of the claims 1, 2, 3, 4 and 7 is present in the petitioner's latch structure. None have been omitted, all are used, even to those most specifically set forth in claims 1 and 2 and the only change is a change in form caused by a transposition of two cooperating parts which in their transposed positions act the same as they do in the latch of the patent in suit.

Point E.

The Record, beginning on page 39, ending page 58, has the history of the application which resulted in the patent in suit. On page 52 an original claim, numbered

7, directed to the keeper alone, as appears from said claim (Rec. p. 50) was rejected and five prior patents were cited. These patents, particularly the patent to Keil, 554,448, and the patent to Dent, 670,506, were relied upon by the petitioner in the courts below as limiting or invalidating the invention of the patent in suit. The Keil patent (Rec. p. 88 et seq.) on p. 89, beginning with line 73, sets forth the operation of the Keil latch. The Dent patent, 670,506 (Rec. p. 96 et seq.) on p. 97, beginning with line 72, defines its operation. They are drop handle latches, normally dropping freely by gravity to the positions shown in Fig. 1 of each patent, having no stops to limit the swing of the lever and hold it either in vertical or horizontal positions, having no fixture with an overhanging arm parallel to the base for mounting the lever as in the patent in suit and the petitioners used latch, and having nothing of the invention defined in claims 1, 2, 3, 4 and 7. The Patent Office, though it had such prior patents before it, did not consider the patents to be anticipatory in any respect of the invention set forth in claims 1, 2, 3, 4 and 7. In fact, these claims were allowed by the Patent Office without change and as they were submitted in the first instance when the patent application was filed. The only other prior patent, that to Charles No. 702,185 (Rec. p. 100 et seq.) which was seriously urged by petitioner, has a swinging lever latch, pivotally mounted between its ends with two arms d and e both at the same side of the pivot which are successively engaged by the two inclines h and i to turn the lever from its open position, shown in Fig. 2, to the closed position shown in Fig. 1. The latch is on the door jamb, the keeper g on the door, there are no stops of any sort to

hold the lever in horizontal or vertical position. If it should be improved to have stops, as shown by the defendant's 1914 latch, one of defendant's exhibits, in its horizontal position it would stand across the door opening and be in the way of the door when the door was closed like the Condit latch described in the introduction of patent 1,385,102 in suit.

Various levers, cams, pins, arms, keepers of various sorts and the like are found in these different prior patents and prior structures. Such is usually the case, particularly at the present state of industrial development when an improvement in an art has been patented. But the mere prior production of various elements and the finding of the same in many different patents is not anticipation nor should they be considered in interpreting and construing the claims of a patent to a combination where the combination itself is new and not anticipated. That there is no anticipation of the combination is in evidence, settled by all the courts. The United States District Courts which first tried the suits involving respondents' patent, and both of the Circuit Courts of Appeals which have passed thereon, have not denied the validity of the patents in suit.

Point F.

The latch used by the petitioner is manufactured by the Dent Hardware Company of Fullerton, Pennsylvania. It claims some weight should be given to the issuance of the Schrader patent, No. 1,575,647 (Rec. p. 156 et seq.) under which it claims to operate, in considering the question of infringement.

It is the position of the respondents herein that this issuance of a subsequent patent under which an infringer operates is immaterial to the question of infringement. There have been innumerable cases of the Supreme Court and of the Circuit Courts of Appeals where the defendant appeared with a patent of its own under which it operated. In Temco Electric Motor Co. vs. Apco Mfg. Co. et al., supra, a very recent case, the Supreme Court, on page 173, 48 Sup. Ct., said:

> "It is well established that an improver cannot appropriate the basic patent of another and that the improver without a license is an infringer, and may be sued as such." (Citing a large number of cases settling this principle.)

It has been stated and restated by the Circuit Courts of Appeals. It is believed that the following from Herman vs. Youngstown Car Mfg. Co., 191 Fed. 579, on p. 584 (6th C. C. A.) is a correct statement of the law showing that the later issue of a patent on the structure which is charged to infringe is completely and wholly immaterial to the question of infringement of an earlier patent.

> "Defendant's device is manufactured under patent No. 765,406, issued July 19, 1904, to J. H. Wagenhorst, and the court below gave to this fact some force in reaching his conclusion that the device did not infringe. We think that the granting of the later patent and defendant's conformity thereto are not of importance in this case on the infringement issue. There are expressions in some reported cases implying that by the later patent the government has granted a right to make and use the article so patented, and that such grant is inconsistent with any construction of the earlier patent which would forbid the manufacture of the later structure. Such

implication rests on a fundamental error. A patent is not the grant of a right to make or use or sell. It does not, directly or indirectly, imply any such right. It grants only the right to exclude others. The supposition that a right to make is created by the patent grant is obviously inconsistent with the established distinctions between generic and specific patents, and with the well-known fact that a very considerable portion of the patents granted are in a field covered by a former relatively generic or basic patent, are tributary to such earlier patent, and cannot be practiced unless by license thereunder.

Another reason sometimes advanced for supposing that the structure of the second does not infringe the claim of the first patent is that the Patent Office has declared that a patentable difference exists. The premise is sound, but not the conclusion. In examining the second application, the Patent Office has no concern with the scope of the claim of the first, and does not and must not pay any attention thereto. It is concerned only with the early disclosure by the specification and drawings. Patentable difference does not of itself tend to negative infringement. It may just as well be based upon infringement, plus improvement; and improvement may lie in addition, simplification, or variance. This is well illustrated by this Wagenhorst patent. The drawings show, and the specifications describe a structure generally similar to Herman's, but each one of the 10 claims is found to be confined to some modification and supposed improvement added to the underlying combinations of the earlier art."

CONCLUSION.

The latch used by the petitioner is identical in the sense of the patent law with that shown, described and claimed in patent No. 1,385,102 in suit. It has the same

elements. Specifically there are no differences in the elements in the combination. The first keeper engaging arm and the under cam edge of the keeper head are physically the same and located at the same places in both latches. The second arm and the cam cooperating therewith are physically the same but have been merely transposed or reversed in position in petitioner's latch. When the door is closed with the latch lever in vertical position, with the latch used by petitioner on the door, the transposed cam on the lever and the transposed second arm on the keeper come together and cooperate to swing the lever about its pivot exactly as the second arm on the lever and the inclined or oblique cam at the upper outer side of the keeper head cooperate in the patent in suit. This change in form, or this attempt to avoid literal wording of claims, is exceedingly common on the part of infringers. Claims 1, 2, 3, 4 and 7 of the patent No. 1,385,102, construed and interpreted in the light of the disclosure on which they are drafted, clearly comprehend, it is submitted, the construction of latch used by the petitioner for such latch used by the petitioner is absolutely identical in the sense of the patent law with the latch patented to respondents and differs therefrom physically only in a mere reversal of cooperating parts which cooperate in identically the same manner in both latches. Other than this mere reversal the two latches are physically identical in every respect.

In fact, it is believed that the present case is one like that decided by Judge Hand in Anchor Cap & Closure Corp., and that the exact scope of the claims 1, 2, 3, 4 and 7 over the prior art and prior structures in the latch art need not be considered as such question of scope be-

comes merely academic by reason of the faithful reproduction of the latch of the patent in suit by the petitioner, except for the mere reversal in parts.

Very respectfully,

ALEXANDER F. WINTERS AND
BASIL R. CRAMPTON.

By Frank E. Liverance, Jr.,
John Boyle, Jr.,
Counsel for Respondents.

Grand Rapids, Michigan.
October 31, 1928.

FILE COPY

IN THE

UNITED STATES SUPREME COURT

October Term, 1928.

No. 128.

SANITARY REFRIGERATOR COMPANY,
Petitioner-Defendant,

v.

ALEXANDER F. WINTERS and BASIL R. CRAMPTON,
Respondents-Plaintiffs.

WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 547.

ALEXANDER F. WINTERS and BASIL R. CRAMPTON,
Petitioners-Plaintiffs,

v.

DENT HARDWARE COMPANY,
Respondents.

WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CONSOLIDATED BRIEF AND ARGUMENT FOR SANITARY REFRIGERATOR CO., PETITIONER IN NO 128, AND DENT HARDWARE COMPANY, RESPONDENT IN NO. 547.

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U. F. HUNTZINGER CO., Appellate Printers, Camden, N. J.

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IN THE

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October Term, 1928.

No. 128.

SANITARY REFRIGERATOR COMPANY,
Petitioner-Defendant,

v.

ALEXANDER F. WINTERS and BASIL R. CRAMPTON,
Respondents-Plaintiffs.

WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 547.

ALEXANDER F. WINTERS and BASIL R. CRAMPTON,
Petitioners-Plaintiffs,

v.

DENT HARDWARE COMPANY,
Respondents.

WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

CONSOLIDATED BRIEF AND ARGUMENT FOR SANITARY REFRIGERATOR CO., PETITIONER IN NO. 128, AND ALSO FOR DENT HARDWARE COMPANY, RESPONDENT IN NO. 547. (DEFENDANTS.)

HISTORY OF THE CASES.

These cases concern the validity and infringement of the Winters and Crampton patent in suit for a door fastener or latch, No. 1,385,102, issued July 19, 1921. (Sanitary R. p. 69.) Defendant's (Sanitary and Dent) device is constructed under Schrader patent No. 1,575,647. (Sanitary R. p. 125.)

THE SANITARY CASE NO. 128.

The Sanitary suit originated in the District Court for the Eastern District of Wisconsin, being originally entitled, Winters & Crampton v. Sanitary Refrigerator Co. From an interlocutory decree entered therein by Judge Geiger, holding said Winters and Crampton patent valid and infringed (Sanitary R. p. 61) defendant, Sanitary Co., appealed. The Circuit Court of Appeals for the Seventh Circuit, in an opinion filed Feb. 9, 1928, held Winters' claims 5 and 6 invalid, and claims 1, 2, 3, 4 and 7 valid and infringed by a device constructed under the Schrader patent, *supra*. (Sanitary R. p. 136, 24 Fed. 2nd 15.) Rehearing was denied March 6, 1928. Certiorari was allowed Oct. 15, 1928.

THE DENT CASE NO. 547.

The Dent case originated in the District Court for the Eastern District of Pennsylvania, by a bill filed on March 15, 1927, by the same plaintiffs on the same patent and same issue of infringement as in No. 128, the case being entitled, Winters & Crampton v. Dent Hardware Co. Motion for preliminary injunction made before Judge Dickinson was denied and the case ordered to final hearing. Following the return of proofs, filing of briefs and arguments on both sides, Judge Dickinson, on Aug. 11, 1927, filed an

opinion holding the Winters and Crampton patent not infringed (20 Fed. 2d 671). Winters and Crampton appealed from Judge Dickinson's decree of dismissal to the Circuit Court of Appeals for the Third Circuit, which, after argument, held the case under advisement for nine months, and in its opinion filed Oct. 4, 1928, affirmed the District Court (28 Fed. 2d 583). Winters & Crampton then petitioned for a certiorari, which was allowed December 3, 1928. Following a joint application by both parties to this Court, an order was entered January 2, 1929, directing that both cases be consolidated and argued as one case when No. 547 should be reached.*

A copy of the opinion of the Court of Appeals for the Third Circuit is attached hereto as Exhibit 1. The opinion of Judge Dickinson, in the Eastern District of Pennsylvania, is attached hereto as Exhibit 2. The opinion of the Court of Appeals for the Seventh Circuit is attached hereto as Exhibit 3. The opinion of the District Court of Wisconsin is attached hereto as Exhibit 4.

JURISDICTION.

This Court has taken jurisdiction by reason of conflict of decisions in two Circuit Courts of Appeal, the Circuit Court of Appeals in the Seventh Circuit holding, in 24 Fed. 2d 15, that the Winters and Crampton patent No. 1,385,102 was valid and infringed as to all claims except 5 and 6 which were invalid, while the Circuit Court of Appeals for the Third Circuit held that said patent was of doubtful validity (Dent R. p. 214) and not infringed. Claims 5 and 6 of said patent were held invalid by both Courts. The defendants' (Sanitary and Dent) device in each case was constructed under Schrader patent No. 1,575,647. (Sanitary R. p. 125.)

* No. 128 will be referred to as the Sanitary case; No. 547, as the Dent case; Winters and Crampton, as plaintiffs; the Sanitary Co. and Dent Hardware Co. as defendants; italics and bold face ours.

CONCISE STATEMENT OF THE CASE.

The usual questions in patent cases are here involved, to wit: Are claims 1, 2, 3, 4 and 7 of the Winters & Crampton patent No. 1,385,102 valid, and are they infringed when properly construed by a structure conforming to the Schrader patent No. 1,575,647? The door fasteners in dispute consist of two elements, a stationary keeper, which was old, and a movable latch or lever, also old, and mounted on a door and tripped by the old keeper when the door is slammed shut.

Counsel for Sanitary and Dent in both Courts of Appeal argued that the Winters keeper was old since original claim 7 therefor was rejected by the Patent Office and cancelled. (Sanitary R. p. 52.) The Winters latch lever, comprising merely a handle or lever with two short angular arms at one end, was also old and unpatentable as Winters claims 5 and 6 thereto have been held invalid by both Courts of Appeal (24 Fed. 2d 15 and 28 Fed. 2d 583). How, then, can any exercise of brain power be involved in bringing two admittedly old structures into one assembly or organization, when no new or useful result is attained, merely **the old result** of tripping the lever by the keeper, when the door carrying the lever is slammed shut?

We believe that the opinion of the Circuit Court of Appeals for the Third Circuit (28 Fed. 2d 583), attached hereto as Exhibit 1, is sound and correct, and counsel for Sanitary and Dent is willing to plant his whole case thereon as it would be impossible more clearly to state the facts and the law. We shall, therefore, endeavor to point out what we think is the error in the Seventh Circuit (the Sanitary) case No. 128, in holding the Winters and Crampton, narrow, restricted, secondary patent valid and infringed by the widely different Schrader construction (Sanitary R. p. 125) of defendants in the Sanitary and Dent cases.

SPECIFICATION OF ERRORS.

(SANITARY CASE).

1. The opinion is erroneous in holding that claims 1, 2, 3, 4 and 7 of the Winters & Crampton patent (Sanitary R. p. 72) are infringed by the device constructed under the Schrader patent No. 1,575,647. (Sanitary R. p. 125.)

2. The opinion is erroneous in finding infringement after holding the Winters and Crampton patent to be a narrow, restricted and limited patent, and finding that such narrow, restricted and limited claims are infringed by defendants' device constructed under said Schrader patent No. 1,575,647. (Sanitary R. p. 125.)

3. The Court of Appeals for the Seventh Circuit erred in not holding the Winters and Crampton patent to be lacking in patentable novelty in view of the prior art, as no new function or result whatever is attained by the collocation of an old keeper and an old lever, merely the old function of the keeper tripping the lever when the door is slammed shut.

SUMMARY OF ARGUMENT.

We shall endeavor to make clear:

(A) That the Circuit Court of Appeals for the Third Circuit did not err in giving the Dent case, No. 547, its independent and untrammelled consideration (28 Fed. 2d 583) since the decree in the Sanitary case, No. 128, was not a *final* decree but an *interlocutory* decree. *McGourkey v. Toledo & Ohio Railway,* 146 U. S. 545; *Smith v. Vulcan Iron Works,* 165 U. S. 524; *Australian Co. v. Gormly,* 138 Fed. 92.

(B) That the statement of invention of the Winters & Crampton patent is a totally erroneous and deceptive statement of the prior art; that its file wrapper shows the keeper element to be old, as original claim 7 therefor was rejected and cancelled, while the latch or lever element of Winters & Crampton claims 5 and 6 is also public property, as said claims have been held invalid by both Courts of Appeal.

(C) That the Winters and Crampton patent is invalid in view of the prior Keil, Dent and Charles patents, as its differentiation therefrom in having the top curved edge of its keeper trip the right-angled top arm of the latch lever brings about no new function or result.

(D) That the Winters and Crampton patent is a narrow, limited, restricted, secondary patent, whose claims are limited by the prior art to the precise construction shown.

(E) The claims of the Winters and Crampton patent are further limited by the concluding words, "substantially as described."

(F) That the Sanitary and Dent devices, with their short radius cam constructed under patent No. 1,575,647 (Sanitary R. p. 125), are structurally differentiated from the

Winters & Crampton patent by language approved by the Patent Office, and do not infringe.

(G) That the grant to the Dent Hardware Co. of said patent No. 1,575,647, covering the Sanitary and Dent device (Sanitary R. p. 125) creates a presumption that there was a substantial difference between plaintiffs' and defendant's latch.

(H) That the corresponding parts of the rival latches are not interchangeable, hence there is no infringement.

(I) That in a doubtful case, the fact that a patented article has gone into use is not conclusive of its utility, much less of its patentable novelty.

POINT A.

AS TO RES JUDICATA OR JUDGMENT BY ESTOPPEL.

The Circuit Court of Appeals for the Third Circuit did not err in refusing to follow the decision of the Circuit Court of Appeals of the Seventh Circuit (24 Fed. 2d 15), for the reason that the decree therein in that Sanitary case is admittedly an interlocutory decree, and so entitled. (Sanitary R. p. 61.) It was not a final decree.

That the decree of a District Court sustaining a patent, declaring infringement, and sending the matter to a Master to take and state an account of profits and damages, is *interlocutory* and not *final*, is settled by this Court in *McGourkey v. Toledo & Ohio Railway*, 146 U. S. 545, 13 Sup. Ct. 172, 36 L. Ed. 1079, where it is said:

> "It is equally well settled that a decree * * * or in equity establishing the validity of a patent, and refer-

ring the case to a Master to compute and report the damages, is *interlocutory* merely."

And also in *Smith v. Vulcan Iron Works*, 165 U. S. 524, 17 Sup. Ct. 410, 41 L. Ed. 810, this Court said:

"But under the judicial system of the United States, from the beginning until the passage of the Act of 1891, establishing Circuit Courts of Appeals, appeals from the Circuit Courts of the United States, in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction, and referring the cause to a Master for an account of profits and damages, was *interlocutory* only, and *not final*, and, therefore, not reviewable on appeal before the final decree in the cause."

There can be no *final* decree in that Sanitary case, until after the following steps, which under the regular procedure, will consist in taking evidence before the already appointed Master in Chancery; the filing of his draft report, and in exceptions to his draft report; and in his final report; and in exceptions to his final report; and in bringing on that final report for argument, on those exceptions before the District Court; and in reaching and formulating the decision of that Court on those exceptions; and in an appeal to the Circuit Court of Appeals, from whatever decree is rendered in the District Court in pursuance of the Master's report; and in arguing that appeal in that tribunal; and in a decision of that appeal by that tribunal. Then and not until then, can a *final* decree be entered.

It is too well settled to require the citation of authorities that only a *final* decree can operate as *res judicata*. The subject is fully discussed in *Australian Co. v. Gormly*, 138 Fed. 92, which is on all fours with the instant case, see bottom of page 99:

"It is insisted by the defendant here that the decree rendered in the former suit by this complainant against Wright's Health Underwear Company is interlocutory,

merely and therefore not *res adjudicata* or an estoppel, even if the Court finds that the defendant here assumed the defense of that action to such an extent that he had the right to control it, offer evidence, examine and cross-examine witnesses, and take an appeal. This Court is of the opinion, in view of the fact that the defendant here does not deny that he assumed the defense of the prior action to such an extent that he controlled it, and that it is established that Gormly did assume the defense of that action, and did have the right to control it and employ counsel therein, and examine and cross-examine witnesses, and take an appeal. This being so, we come to the question whether the decree granting an injunction and an accounting made by the Circuit Court, and appealed from and affirmed by the Circuit Court of Appeals, is *interlocutory* merely, or *final,* on the question of the validity of the patent in question, and the question of infringement by the making and selling or using of the alleged infringing article; that is, is it a final decree in the sense that it is either an estoppel or strictly *res adjudicata* as to the defendant, Gormly?"

On pages 100 to 103, the Court discusses the authorities and the distinctions between an *interlocutory* and a *final* decree, and at the bottom of page 103, holds that since the matter of the action in the other case was pending before a Master, that the prior decision referred to or the judgment following the same was *interlocutory* merely, not *final,* and that it was proper to proceed to decide the Gormly case on its merits. Notwithstanding the Court of Appeals had held the patent there involved valid, Judge Ray then proceeded to decide that Gormly case on its merits, and ordered the dismissal of the bill therein. Perhaps the best answer to Winters' and Crampton's assertion that a final decree or its equivalent was entered in the Seventh Circuit, is in the fact that these cases are here for final review, and no final decree can be entered in the Seventh Circuit case until, and in pursuance to, the mandate of this Court. It is, therefore, submitted that the four Federal Judges in

the Third Circuit did not err in considering and deciding the Dent case (20 Fed. 2d 671 and 28 Fed. 2d 583), nor did they err in their conclusions as to non-infringement.

POINT B.

THE PATENT IN SUIT AND THE ANTIQUITY OF ITS KEEPER AND LEVER.

The first column of the patent in suit, No. 1,385,102 (Sanitary R. p. 71), relating to the Condit patent, which purports to be a recital of the prior art, is probably the most misleading and deceptive "statement of invention" that ever appeared in any patent. One reading this matter would naturally believe that the so-called Condit latch was the only prior art refrigerator latch that had ever been made and that Winters and Crampton were the first or only ones to obviate the alleged disadvantages therein.

Lines 37 to 45 of the patent in suit, No. 1,385,102, say:

> "In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other." (Sanitary R. p. 71.)

Lines 54 to 60 (Sanitary R. p. 72) of the patent in suit, say:

> "In any case, the latch lever engages with the latch keeper when the door is closed irrespective of the position of the lever. This is a feature of merit in the invention, and one of particular value from a practical standpoint when the latch is used on refrigerators."

The natural inference from the foregoing would be that Winters and Crampton were the first to approach and solve the problem, of a refrigerator latch, which would automati-

cally lock when the door was slammed, no matter whether the latch lever stood horizontal or vertical, whereas the truth is that this structure was old, and had been well known in the art for the last quarter of a century, and millions of automatic, springless latches of this general construction had been made and sold by defendant (Dent) before plaintiffs had ever built a latch of any character. (Dent R. bottom of p. 20 and middle of p. 22.)

In various places in their brief, as page 6, they say the slamming of the door automatically wedges the end of the latch lever with the bottom notch of the keeper. From their patent, which is the highest source of information, it is implied that the action is not wholly automatic, since after the door is slammed shut, a further manual operation or downward pull on the handle is necessary to effect locking.

> "It is apparent that by giving the end of the handle 11 a downward movement the door will be wedged tightly shut as the arm 9 moves upwardly against the incline 20." (Sanitary R. p. 72, 27 to 30.)

In the Courts below, plaintiffs had much to say about their latch lever swinging parallel to the door, but this feature is not even mentioned in the record or specification of the patent in suit, nor is there the slightest advantage or utility shown therefor. This feature is shown in probably half the patents in this record, and has been on the majority of barn doors for probably the last century. The Winters and Crampton fastener is merely an old keeper having a triangular nose and a bottom notch, plus an equally old lever pivoted to the door and comprising a handle and two arms on the opposite end, yet plaintiffs have taken many pages of their brief to describe this simple contrivance.

WINTERS AND CRAMPTON'S FILE WRAPPER—THE KEEPER.

Plaintiff's file wrapper (Sanitary R. p. 52) shows that Winters and Crampton's original claim 7 to their keeper, which reads as follows:

"7. A keeper for latches comprising a base, a post projecting outwardly from the base at the upper portion thereof, and a head to the post depending below the same and being substantially triangular in outline, having an upper and a lower outer side coming substantially to a point and an inner upwardly and inwardly inclined side, substantially as described,"

was rejected by the Patent Examiner on April 15, 1921, the Patent Office action reading as follows (Sanitary R. p. 55):

"Claim 7 does not patentably distinguish over the following patents:
Keil, 554,448, Feb. 11, 1896 (202-241);
Ward, 1,250,736, Dec. 18, 1917 (292-242),
and is rejected. The remaining claims appear allowable.

In amending, see the following art:
Dent, 670,506, Mar. 26, 1901 (292-241);
Hadka, 743,716, Nov. 10, 1903 (and),
Blye, 1,238,876, Sept. 4, 1917 (292-242).

Examined Div. 20."

This rejected claim was cancelled. Consequently there was no novelty whatever in Winters and Crampton's keeper as is shown by a mere inspection of the references cited by the Patent Examiner as Keil (Sanitary R. p. 78) and Ward. (Sanitary R. p. 112.)

PLAINTIFF'S LATCH LEVER.

The Winters and Crampton latch lever (Sanitary R. p. 70) is merely a handle having a pivot or fulcrum and a pair of right-angled arms 9 and 12 near the pivot at the end opposite the handle. This contrivance was attempted to be covered by Winters and Crampton's claims 5 and 6. (Sanitary R. p. 73.) As these two claims have been held invalid by both Courts of Appeal, the Winters and Crampton lever structure is now public property.

SUMMARY AS TO PLAINTIFFS' KEEPER AND LEVER.

It being clear from the foregoing that Winters and Crampton's keeper 16, 17, 18 and 19 and lever 11 (Sanitary R. p. 70) are public property, the next inquiry is what, if anything, did the plaintiffs invent? They collocated the old latch lever on the door so that the top right-angled arm 12 of the lever, when the latter happened to stand vertical, **rides over the top of the curved edge 18 of the keeper,** which causes their latch lever 11 to be kicked or tripped when the door is slammed, so that the other arm 9 can engage the under recess 20 of the keeper. **This, however, brings about no new function or result.** The Winters and Crampton keeper merely functions to trip the latch or lever just as occurs in all of the fasteners in this ancient art, which are composed of a latch lever and a keeper to trip it, in one way or another, when the door is slammed shut.

POINT C.

INVALIDITY OF THE WINTERS AND CRAMPTON PATENT IN VIEW OF KEIL, DENT AND CHARLES PATENTS.

KEIL PATENT, NO. 554,448, FEBRUARY 11, 1896.

(Sanitary R. p. 78.)

Keil shows a springless, automatic latch lever 7 having arms 4 and 5, which lever will automatically lock when the door is slammed, when said lever stands in a horizontal, vertical or intermediate position (Sanitary R. p. 139), as clearly appears by the operation of the physical specimen of the Keil fastener. Keil's statement of invention (Sanitary R. p. 79, lines 9 to 24, page 1 of Keil patent) is just as readable on Winters and Crampton's contrivance as on Keil.

"This invention relates to that class of door clamps and openers in which a lever having suitable studs to engage a keeper is utilized to force a door tightly to its seat when moved in one direction and to start or 'pry' the door open when moved in the other direction, this type of invention being particularly adapted for refrigerator or other doors which require an absolutely tight closure.

The object of my invention is to produce a simple device of the type mentioned, one which is certain in operation, of small cost, and which will both clamp and start the door in a direct horizontal plane without tendency to move the door in any direction other than that for which its hinges provide."

Keil's keeper 8 is mounted on the door casing and the latch lever 7 is mounted on the door just as in plaintiffs' Winters and Crampton's patent. If any broad construction is attempted to be given to said plaintiffs' patent, as being for a springless, automatic latch lever which will trip and lock in a vertical or horizontal position, plus a co-acting keeper, manifestly such construction is present in the Keil patent, which has been public property ever since the year 1913.

In the plate facing this page, we have reproduced the Keil patent drawings with the latch lever 7 colored red, the arms 4 and 5 colored green, and the keeper 8 yellow. Keil's yellow keeper 8 is mounted on the door casing and the red latch lever 7 is pivotally mounted on the door between its ends precisely as in plaintiffs' Winters and Crampton patent. One end of Keil's lever is formed into an operating handle and the other into a keeper engaging green arm 5. Keil has another green arm 4 projecting from the handle portion of the lever a short distance from its pivot. Keil's keeper has an inclined wall 9 for engagement with the respective green arms 5 and 4 when the lever is in horizontal, vertical or intermediate positions, respectively, when the door is closed, automatically to operate the lever, so that the arm 5 will engage under the keeper, when the door is

(No Model.)

H. F. KEIL.

LATCH.

No. 554,448. Patented Feb. 11, 1896.

Fig. 1.

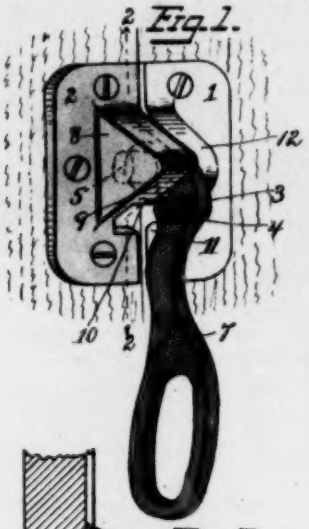
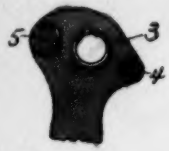


Fig. 6.



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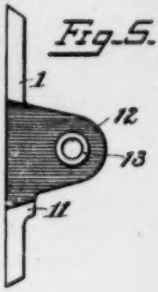


Fig. 2.

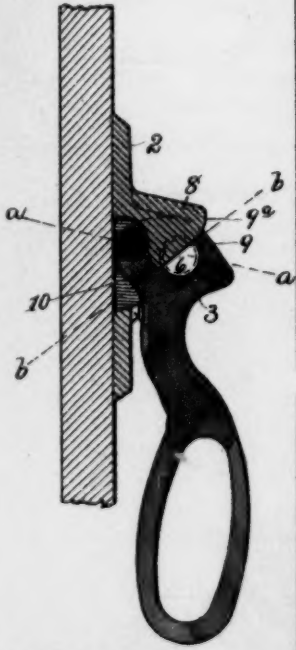


Fig. 3.

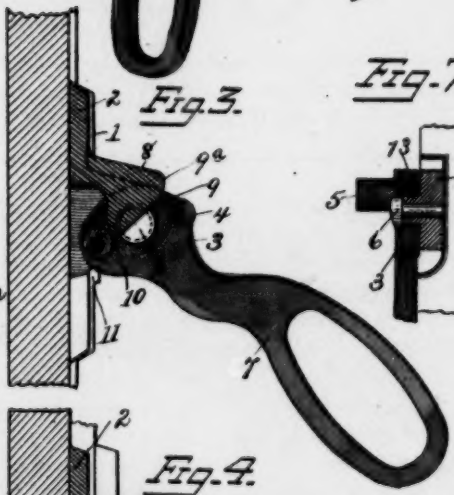
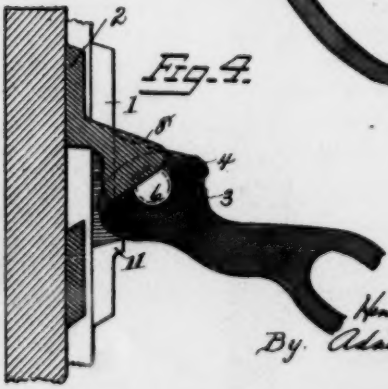


Fig. 7.

Fig. 4.



WITNESSES:

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H. F. KEIL.
LATCH.

No. 554,448. PATENTED FEB. 11, 1896.

Fig. 2.

Fig. 3.

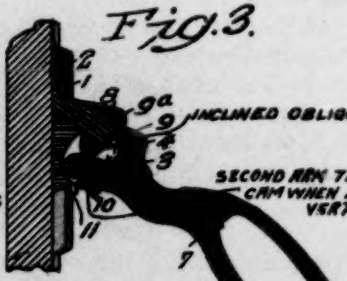
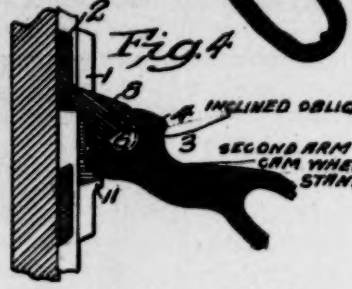
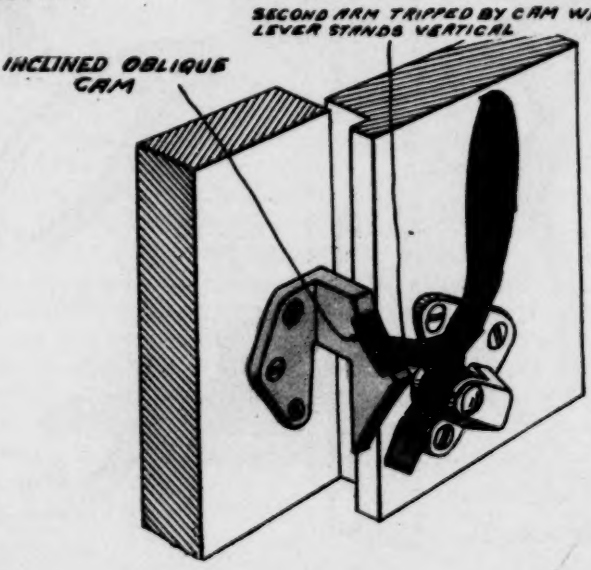


Fig. 4.



PLAINTIFFS

WINTERS & CRAMPTON LATCH.



entirely closed. The Keil fastener enjoyed a wide sale and is on the market today. (Dent. R. p. 21.)

The elements in Winters and Crampton's claim 3 arranged in tabulated form are as follows (Sanitary R. p. 72):

(a) a door,
(b) a casing,
(c) a keeper attached to the casing,
(d) a latch lever pivotally connected to the door,
(e) means on the keeper, and,
(f) means on the latch lever to engage with the keeper on the outer sides thereof to swing the lever into engagement with the keeper at the inner side thereof when the door is closed with the lever occupying either a vertical or a horizontal position, substantially as described.

From the comparative drawing facing this page showing Keil at the top and plaintiff below, it will be seen that the above claim is just as readable on Keil as on Winters and Crampton.

Plaintiffs' claim 7 reads as follows:

> "In combination, a door and a casing therefor, a keeper attached to the casing, a latch lever pivotally mounted on the door between its ends, one end of the lever being formed into an operating handle and the other into a keeper engaging arm, a second arm projecting from the handle portion of the lever a short distance from its pivot and at an angle to the first arm, said keeper being formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed, to automatically operate the lever so that it will engage under the keeper when the door is entirely closed, substantially as described." (Sanitary R. p. 73.)

If this claim is construed as plaintiffs' demand, we see no theory on which it can be saved in view of Keil. When Keil's red lever 7 is standing horizontal and the door carry-

ing the lever is slammed shut, the pin 4 will engage the upper portion of the inclined wall 9 which will throw the lever 7 into the position seen in Fig. 4, then into the position seen in Fig. 3, and then into the locked position seen in Keil's Fig. 2. An inspection and operation of the specimen of the Keil structure clearly shows that the Keil lever will automatically lock when the door is slammed, no matter whether the lever is standing horizontal or vertical or in any intermediate positions. The main thing in plaintiffs' claim 7 which is not present in Keil is the limitation of plaintiffs' second or top arm being at an angle to the first arm. Keil's arms 4 and 5 are parallel, whereas plaintiffs' arms 12 and 9 are at right angles to each other, but what difference or improved function or result is attained by plaintiffs' right-angled arm contrivance over Keil's parallel arm arrangement? **The plaintiffs' patent is silent and so is the record.** If plaintiffs' claim 7 is read so as to sweep within its ambit defendant's (Sanitary and Dent) patented device, and without restricting it to **the upper arm 12 riding over the curved top face of the plaintiffs' keeper 18,** which Dent and Sanitary do not do, then plaintiffs' claim 7 is manifestly invalid in view of Keil.

It is well settled that to readjust or readapt old elements, as the terminal arms of these levers, or to substitute for one old element in a combination another old element which may be better suited for the purpose, is not invention, under the familiar decisions of this Court. It is impossible to reach any other conclusion, when we find this Court in *Brown v. Piper,* 91 U. S. 37, holding the fish-preserving process anticipated by a "corpse preserver," as well as by the ordinary ice cream freezer; and in *Crescent Brewing Co. v. Gottfried,* U. S. 158, holding the patented process and apparatus for pitching the interior of beer kegs anticipated by the ancient "pewterer's blast" and in *Peters v. Mfg. Co.,* 129 U. S. 350, holding the patented contrivance for applying metallic moldings to buggy dashes anticipated by prior devices for applying metal backs to combs; and in *Aaron v. Railway Co.,* 132 U. S. 84, holding the devices for opening and closing the gates of elevated railway cars anticipated by the transom lifters of the prior

art; and in *Royer v. Roth,* 132 U. S. 201, holding a rawhide fulling machine anticipated by a washing machine; and in *Howe Machine Co. v. Needle Co.,* 134 U. S. 388, holding the machine for turning sewing machine needles anticipated by the prior machine for turning wooden skewers and spindles; and in *St. German v. Brunswick,* 135 U. S. 277, holding the revolving billiard cue rack anticipated by revolving dining tables and bottle casters; and in *Bussell Trimmer Co. v. Stevens,* 137 U. S. 423, holding the rotary cutter for trimming the edges of boot and shoe soles anticipated by the prior cutter for cutting the teeth of metal gear-wheels; and in *Knapp v. Morss,* 150 U. S. 221, holding an expansible dress form anticipated by a common umbrella. There is not a line in this record showing the slightest advantage or utility being attained by the use of the plaintiffs' right-angled arms 12 and 9 in lieu of Keil's parallel arms 4 and 5, since the ultimate function of the arms in both the Keil and Winters & Crampton structures is identical, to wit: to effect a tripping of the latch lever by the co-action of the arms with the keeper, no matter whether said latch lever stands horizontal or vertical. *Atlantic Works v. Brady,* 107 U. S. 192.

The foregoing Winters and Crampton's claims 3 and 7 discussed, *supra,* are typical of the other claims as 1, 2 and 4, which are all of substantially the same scope. Claim 2, in its latter part, is the only one accurately describing the construction, wherein it says that the second arm is "adapted to ride **against the upper outer side of the keeper** when the door is closed with the lever positioned vertically."

But no new function or result is attained by this, merely the ancient act of tripping of the lever when it hits the keeper.

Circuit Judge Davis, a very experienced patent Judge, speaking for the Court of Appeals for the Third Circuit (Dent R. p. 210) accurately stated the analogy between Keil and Winters & Crampton:

> "The keeper in the Keil patent is strikingly similar in both form and function to that of the patent in suit.

In Keil, the keeper has a base attached to the casing by three screws. From this base a post extends downwardly for a distance below the lower edge of the post. The head of the latch is the apex of the triangle. The two sides terminating in the head are practically straight, while those of the patent in question are somewhat curved. From the apex of the keeper when attached to the casing, one of the triangular sides extends upwardly and the other downwardly. The inner or lower side is cut upwardly and somewhat inwardly at a slight angle to the vertical, forming a wedging cam. This meagre description reads equally well on the keeper of either the Keil patent or the patent in suit.

The function of every part of the Keil keeper is practically identical with that of the keeper of the patent in question. One or the other of the arms of the latch lever of the Keil latch slides down on the lower triangular side of the keeper when the door is being closed. Which one of these two arms contacts with this lower side depends upon the position in which the latch lever is when the door is closed. The function performed by the plaintiffs' keeper and the Keil keeper in co-operation with the latch levers is the same function performed by keepers generally in the prior art patents. Only one of the sides of the Keil keeper, however, engages the arms of the latch lever and serves as a cam to direct the lever when the door is closed, but this is due to the design of the arms of the levers and not to difference in principle of operation.

The next question concerns the latch lever. Judge Evans, in construing this patent in the Circuit Court of Appeals for the Seventh Circuit, said that, 'patentable novelty resides in the structural differences of the latches (either in the keeper member or latch member or both).' A pin is run through the lever about one inch from the end which engages the keeper. This serves as a pivot or fulcrum. This latch lever is really a handle having two right-angled arms near the pivot. One is the extension of handle beyond the pivot and

the other is at right angles to it. In operation, one of these two arms 'is engaged with an outer portion of the keeper when the door is moved to closing position to swing the lever from a vertical position to a horizontal and engage the other arm under the keeper, and the other (arm) of which is engaged with a different outer portion of the keeper when the door is moved to closing position and the lever is horizontal to run the lever upwardly toward vertical position or until said upper arm passes under and engages with the keeper to hold the door closed.' These general features and functions of latch levers were old in the art. The lever in the Keil patent has the general features of the plaintiffs' lever. It will lock when the door is closed whether the lever is in a horizontal, vertical or an intermediate position, because of the co-operation of the two arms 4 and 5 of the lever latch with the keeper 'to force the door tightly to' when it is shut. The keeper is mounted on the door casing just as in the patent in suit. The latch lever is pivotally mounted between the ends on the door. One of the ends forms the operating handle and the other contains two arms, one or the other of which engages the cam on the keeper when the door is closed.

The elements common to the devices of Keil and the plaintiffs are: a door, a casing, a keeper attached to the casing, a lever latch pivotally attached to the door, means on the keeper to engage the arms of the latch and means on the latch to engage with the keeper. The two arms of the engaging end of the Keil lever, however, are in the same parallel plane while the two arms on the plaintiffs' lever are at right angles, but both perform the same function, and this difference is one of design and not of principle of operation."

THE DENT FASTENER (PATENT NO. 670,506).

(Sanitary R. p. 84.)

Defendant's early Dent latch, made in millions by the Dent Hardware Co. under the Dent patent of 1901 (Sanitary R. p. 84), possessed the capability of automatically locking when the door was slammed, no matter whether the latch stood in a vertical or horizontal position (Dent R. pp. 20 and 21), as will be seen at a glance from the plate facing this page, the keeper being yellow and the lever red. Fig. 2 of the Dent patent shows the lever f horizontal and ready to be tripped by the keeper. If the handle f stands vertical, the lug g will hit the keeper h, tilt and lock the lever when the door is slammed shut. The Dent Hardware Co. made millions of latches under this early Dent patent which still enjoys a large sale. These fasteners were fool-proof and the latch tripped and locked when the door was slammed in whatever position, horizontal or vertical, the latch lever might be (Dent R. pp. 20 and 22), many years before the plaintiffs' patent in suit had even been thought of. The practical and commercial art of refrigerator latches had been fully developed by the Dent Hardware Co. for several decades prior to the patent in suit. There was, therefore, no problem to be solved by the plaintiffs. Whatever novelty, if any, can be accorded plaintiffs' construction, must be ascribed to the use of the top curved edge 18 of plaintiffs' keeper tripping the right-angled arm 12, on the top of the plaintiffs' latch lever 11 (Dent R. p. 105), when said lever stands vertical and the door is slammed. But no new function is created thereby. The tripping action of the plaintiffs' latch when the latch lever stood horizontal, was precisely the same as in innumerable latches of the prior art such as Keil (Dent R. p. 124), or Ward. (Dent R. p. 198.)

No. 670,506. Patented Mar. 26, 1901.

H. H. DENT.

LATCH.

(Application filed Nov. 28, 1900.)

(No Model.)

Fig. 1.

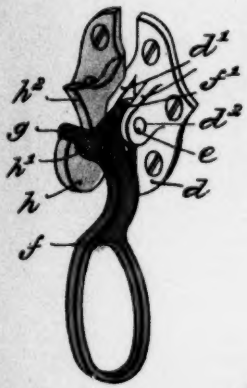


Fig. 2.

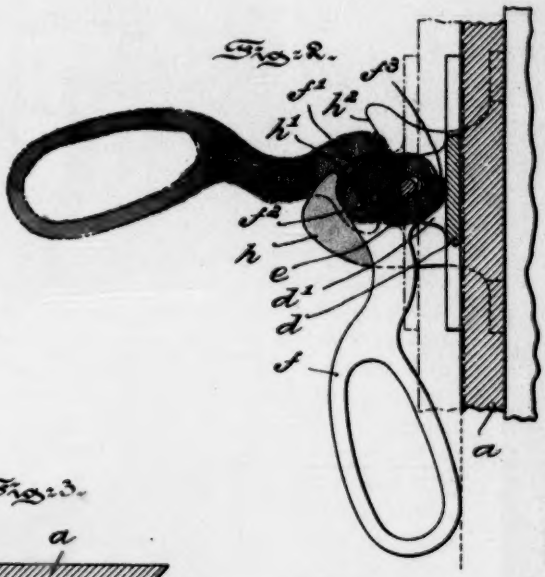


Fig. 3.

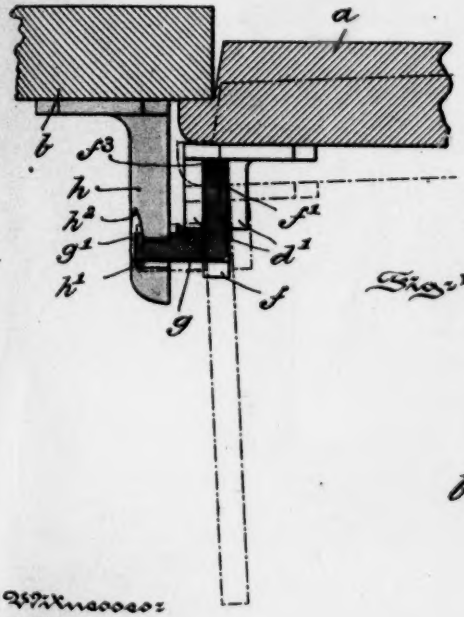
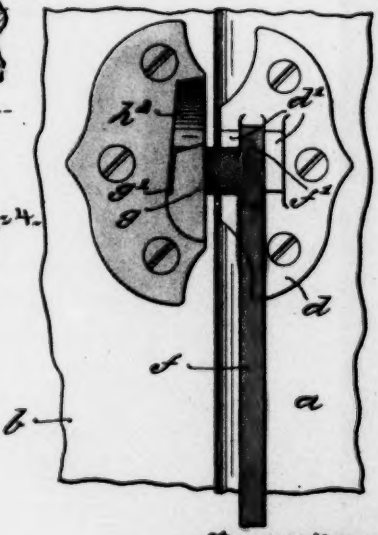


Fig. 4.



Witnesses:
Wilhelm Vogt
Thomas M. Smith.

Inventor:
Henry H. Dent
by J. Walter Taylor

No. 702,185. Patented June 10, 1902.

A. CHARLES.

LATCH.

(Application filed Jan. 26, 1901.)

(No Model.) 2 Sheets—Sheet 2

Fig. 5.

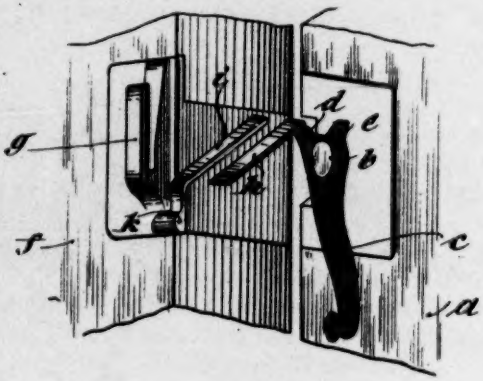


Fig. 6.

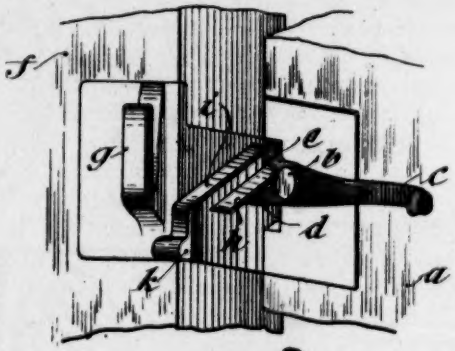
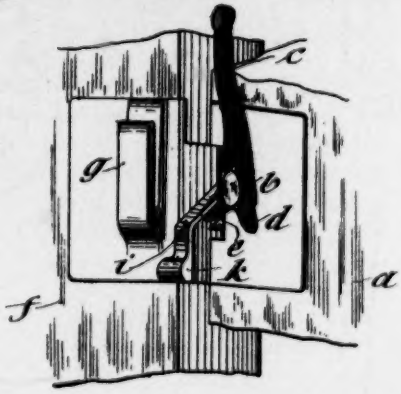


Fig. 7.



Witnesses
Thomas Kirkpatrick
H. van Heusen Brinckerhoff

Inventor
Antoine Charles
by Alexander & Dowell
Attorneys

CHARLES PATENT NO. 702,185.

(Sanitary R. p. 87.)

The Charles patent No. 702,185 shows a structure wherein the keeper or "latch catch" is on the door and the latch pivoted to the door casing, the closing of the door tripping the latch.

Charles, whether considered from a mechanical or patent point of view, is a full equivalent of plaintiffs' structure in the Winters and Crampton patent in suit, as will be seen from the full-sized exhibit of the Charles patent and also from Figs. 5 and 6 of the same, facing this page, wherein the latch lever is colored red. The latch member c of the Charles fastener is provided with a handle portion adapted to stand vertical as seen in Fig. 5 or to stand horizontal as seen in Fig. 6 and to trip with equal facility from either position. The Charles lever is provided with two arms e and d, one extending beyond the handle and pivot and the other extending at substantially a right angle thereto. Practically all Winters and Crampton have done over Charles is to reverse the parts, *i. e.*, pivot the latch lever to the door and put the keeper on the door jamb or casing. A mere reversal of parts is not invention.

Of the Charles patent, the Court of Appeals for the Third Circuit said (Dent R. pp. 212 and 213):

> "The Charles patent, No. 702,185, issued June 10, 1902, shows a device having a latch lever corresponding in its essential features with the plaintiffs'. It has a handle portion which may stand in a horizontal, vertical or intermediate position. There are two arms on the other end, one extending beyond the pivot or fulcrum and the other substantially at right angles to it. The function of these arms, co-acting with the keeper is to fasten the door when it is shut and to hold it in a closed position. This latch considered as a design structure is somewhat different from the plaintiffs', but functionally both are substantially the same.
>
> The function of the arms generally is to trip, or

give a kick to the latch lever by the co-action of the arms with the keeper when the door is closed. The object of all these tripping devices, which are numerous and old in the art, is to fasten the door and hold it in a closed position regardless of the position of the lever when the closing operation begins."

The construction and function of the latch levers of Keil and Charles and their analogy to Winters and Crampton will be apparent from the plate facing this page. The defendant's lever, at the bottom of said plate, is manifestly quite different from those above it.

Under the state of the art and the facts relating to fasteners prior to the Winters & Crampton patent, the claims in question are lacking in patentable quality and are not infringed. Among the almost innumerable pertinent decisions of this Court are the following in which letters patent were held void for anticipation and want of novelty:

(Corded fabric.) *Smith v. Nichols,* 21 Wallace 112;

(Return flue steam boiler for straw burning engine.) *Heald v. Rice,* 104 U. S. 737, 754, 755;

(Fuel magazine for fireplace heater.) *Thatcher Heating Co. v. Burtis,* 121 U. S. 286, 294, 295;

(Device for operating street car door.) *Stephenson v. Ry. Co.,* 114 U. S. 149, 156;

(Ageing wine by steam in pipes.) *Dreyfus v. Searle,* 124 U. S. 60, 63;

(Railway frogs for switches.) *Weir v. Morden,* 125 U. S. 98, 108;

(Grain car doors.) *Watson v. Cincinnati, Indianapolis, etc. Ry. Co.,* 132 U. S. 161, 167;

(Improvement in shoes.) *Burt v. Evory,* 133 U. S. 349, 358;

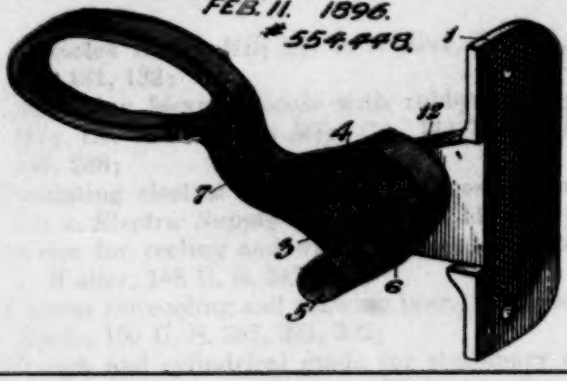
(Corsets.) *Florsheim v. Schilling,* 137 U. S. 64, 76, 77;

(Grating for prison doors.) *Fond du Lac County v. May,* 137, U. S. 395, 406, 407;

(Substitution of belts and pulleys in place of shafts and cog gears for grinding rolls.) *Con-*

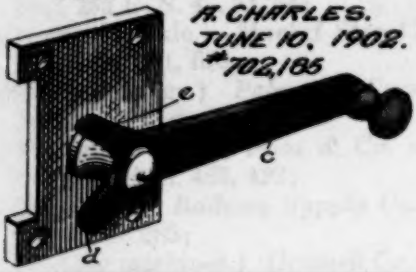
LEVER OF PATENT TO
H. F. NEIL.
FEB. 11. 1896.
554,448.

(SANITARY R.p. 78.)



LEVER OF PATENT TO
H. CHARLES.
JUNE 10. 1902.
702,185

(SANITARY R.p. 88.)



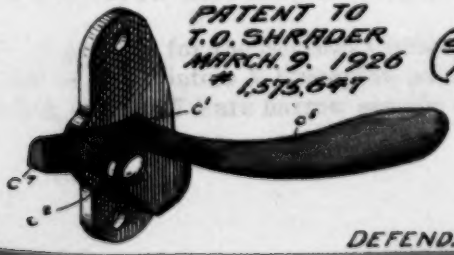
LEVER OF PATENT TO
WINTERS & CRAMPTON.
JULY. 19. 1921.
1,385,102.

(SANITARY R.p. 70.)

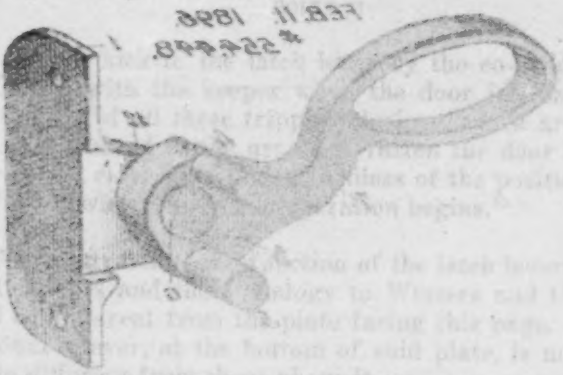
PLAINTIFFS

LEVER OF
PATENT TO
T. O. SHRADER
MARCH. 9. 1926
1,575,647

(SANITARY R.p. 125)



DEFENDANT



solidated Roller Mill Co. v. Walker, 138 U. S. 124, 131, 132;
(Cushioning bicycle pedals with rubber.) *Pope Mfg. Co. v. Gormully Mfg. Co.,* 144 U. S. 238, 247, 248;
(Insulating electric conductors.) *Ansonia Brass Co. v. Electric Supply Co.,* 144 U. S. 11, 17-19;
(Device for reeling and winding thread.) *Grant v. Walter,* 148 U. S. 547, 553;
(Process for cooling and drawing beer.) *Magin v. Karle,* 150 U. S. 387, 391, 392;
(Trough and cylindrical guide for stationary engine rods and cross-heads.) *Wright v. Yuengling,* 155 U. S. 47, 53, 54;
(Oil cup for axle.) *Market Street Ry. v. Rowley,* 155 U. S. 621, 629;
(Sewer gratings.) *Palmer v. Corning,* 156 U. S. 342, 343, 344;
(Windmill.) *Mast, Foos & Co. v. Stover Mfg. Co.,* 177 U. S. 485, 492;
(Tie plates.) *Railway Supply Co. v. Elyria Co.,* 244 U. S. 285;
(Washing machines.) *Grinnell Co. v. Johnson Co.,* 247, U. S. 426;
(Hair cloth mat.) *Werk v. Parker,* 249 U. S. 130;
(Tire machine.) *Thropp's Sons v. Seiberling,* 264 U. S. 320;
(Spot welder.) *Thompson Spot Welder Co. v. Ford Co.,* 265 U. S. 445.

POINT D.

THE WINTERS & CRAMPTON PATENT IS A NARROW, LIMITED, RESTRICTED, SECONDARY PATENT, WHOSE CLAIMS ARE LIMITED TO THE PRECISE CONSTRUCTION SHOWN, IF VALID AT ALL.

The Court of Appeals for the Seventh Circuit (Sanitary
136) said of the Winters & Crampton patent in suit,
laims, 1, 2, 3, 4 and 7 "are narrow specific claims."

"No difficulty would be experienced in finding infringement if the patent were a pioneer or was one covering such an improvement as entitled it to a broad range of equivalency."

"It is an extremely narrow one as a reading of the claims at once discloses. Moreover, the record shows a prior art loaded with latches possessing some of the features of appellee's latch."

"The prior art as disclosed by the Keil patent No. 564,448, the Dent patent No. 67,506, and Charles patent No. 702,185, the Schrader patents Nos. 1,117,709, and 1,170,685, the Ward patent No. 1,250,736, all refute the contention of asserted novelty, in the location of the keeper upon the door jamb and the lever upon the door or in providing for the automatic closing of the door without regard to the position of the lever. It may be true that in some of these disclosures because of the law of gravity the lever invariably takes out one position.

In the Dent patent the keeper was attached to the casing while the member carrying the latch lever was attached to the door. In the Charles latch the keeper was on the door while the other member was on the casing. The Keil latch had its keeper on the casing and the latch member on the door. Each structure, examples of which are in evidence, works automatically when the door is slammed shut whether the latch lever is in a horizontal or a vertical position."

* * * * * * * *

"It follows, therefore, that a patentable novelty, if any exists, is restricted to the particular structure disclosed."

* * * * * * * *

"But it is this narrow field and nothing more which the inventor possessed when he secured his patent."

Circuit Judge Davis speaking for the Court of Appeals in the Third Circuit said of these Winters & Crampton's claims 1, 2, 3, 4 and 7:

"We have grave doubt as to the validity of the other claims, but if they are valid, their scope is clearly confined to the structural design disclosed." (Dent R. p. 214.)

It clearly appears from the foregoing that the Winters & Crampton patent in suit is not a primary patent. It is a narrow, restricted, limited, secondary patent, if it can be saved at all, and the Court of Appeals for the Seventh Circuit seems to have wandered afar from and entirely disregarded the familiar rules anent primary and secondary patents, which have been laid down by this Court in the following leading cases which we have collected not for purposes of instruction but so that the Court can conveniently refer to them if it so desires.

McCormick v. Talcott, 20 Howard 405, 1857;
Burr v. Duryee, 1 Wall. 531;
Railway Co. v. Sayles, 97 U. S. 556, 1878;
Morley Machine Co. v. Lancaster, 129 U. S. 273, 1889;
Pope Mfg. Co. v. Gormully Mfg. Co., 144 U. S. 242, 1892;
Sessions v. Romadka, 145 U. S. 45, 1892;
Knapp v. Morss, 150 U. S. 230, 1893;
Miller v. Eagle Co., 145 U. S. 204, 1894;
Duff v. Pump Co., 107 U. S. 639, 1882;
Boyd v. Janesville Hay Tool Co., 158 U. S. 267, 1895;
Dashiell v. Grosvenor, 162 U. S. 432, 1896;
Westinghouse v. Boyden, 170 U. S. 537;
Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 1, 1903;
Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 1905;
Railroad Supply Co. v. Elyria Iron & Steel Co., 244 U. S. 285;
Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426;
Werk v. Parker, 249 U. S. 130;

Bone v. Marion County, 251 U. S. 134;
Biedler v. U. S., 253 U. S. 447;
Berlin Co. v. P. & G. Co., 254 U. S. 156;
N. Y. Scaffolding Co. v. Liebel Co., 254 U. S. 24;
Weber Co. v. E. H. F. Electric Co., 256 U. S. 668;
Vandenburg v. Truscon, 261 U. S. 6;
Thropp's Sons v. Seiberling, 264 U. S. 320;
Thompson Spot Welder Co. v. Ford Co., 265 U. S. 445;
Concrete Co. v. Gomery, 269 U. S. 177;
Stilz v. U. S., 269 U. S. 144;
I. T. S. Rubber Co. v. Essex Rubber Co., 272 U. S. 429.

In *McCormick v. Talcott,* 20 Howard 405, 1857, which is usually regarded as the first of these great cases, the divider of Manny was held not to infringe the divider claim of McCormick, because the prior art devices had contained dividers which performed substantially the same function as McCormick's divider and therefore narrowed the McCormick rights enough to negative the charge of infringement.

In *Burr v. Duryee* (1 Wallace 531), Mr. Justice Grier said:

> "That two machines produce the same effect, will not justify the assertion that they are substantially the same, or that the devices used by one are therefore, mere equivalents for those of the other. * * * In this case we have an attempt to convert an improved machine into an abstraction, a principle or mode of operation, or a still more vague and indefinite entity often resorted to in argument, an 'idea.' Those who use the latter term seem to have no fixed idea of what they mean by it."

So well settled is this doctrine, and so frequently followed and applied during the sixty-five years that have

elapsed since *Burr v. Duryee* was decided, that it has been formulated into text-book law and as such is stated in *Robinson on Patents,* Sec. 509, as follows:

> "Patents are not granted for abstract ideas, principles, modes of operation, functions or results of machines, but underlying every patentable invention is the idea of means. The thing patented is the concrete expression of this idea; the mechanism by which it is reduced to practice: Burr v. Duryee, 1 Wall 531; O'Reilly v. Morse, 15 How. 62. It is this which must be set forth in the claim, in distinction from the discovery or conception, idea or mode of operation which it embodies; Robinson, Sec. 509."

Railway Co. v. Sayles, 97 U. S. 555, 1878, was based on the Tanner Car Brake patent.

This Court here applied the doctrine of primary patents and secondary patents to the Sayles case, and held that patent to be a secondary patent and not a primary one, and therefore narrowed its construction enough to negative its infringement by the defendant, and reversed Judge Drummond's decision to the contrary.

In *Morley Machine Co. v. Lancaster,* 129 U. S. 273, 1889, Mr. Justice Blatchford delivered the opinion of this Court, wherein he embodied the fourth great decision on the subject of primary and secondary patents. He began that explanation by stating the law to be that the claims of a mere improver upon a prior machine, which was capable of accomplishing the same general result, would properly receive a narrower construction, than the liberal construction to which the claims would be entitled, of the first person to produce that result. Thereupon, Justice Blatchford reviewed the McCormick case and the Sayles case, in particular support of that doctrine.

The foregoing are the first four of the leading Supreme Court cases on the law of primary and secondary patents. We will not take the time to analyze all the next cases, but will refer to some of the later cases.

Dashiell v. Grosvenor, 162 U. S. 432, 1896, was based on letters patent No. 425,548, granted to Lieutenant Seabury on an improvement in breech loading cannon. Judge Morris held the patent valid and infringed, and had entered a decree for the plaintiff (62 F. R. 584). The Circuit Court of Appeals for the Fourth Circuit, while not disagreeing with Judge Morris on either of those two points, had reversed his decision on the ground that it would prohibit the officers in charge of the navy yard from manufacturing guns for use on the war vessels of the United States.

This Court did not consider that subject but affirmed the decision of the Circuit Court of Appeals on the ground of non-infringement. In arriving at that conclusion, this Court held, and had to hold that identity of function between a patent in suit and the prior art, is enough to relegate that patent to a narrow construction. 162 U. S. page 432, last paragraph.

> "As several of the patents above described show that, at the date of the Seabury invention, it was no longer a novelty to perform the three movements necessary to open and close the breach, by the continuous movement of a single lever, it follows that the first claim of this patent cannot receive the broad construction claimed, but must be limited to the precise mechanism described."

THE AIR BRAKE CASE, 170 U. S. 537.

Precisely the same argument urged by plaintiffs, which has been followed by the Court of Appeals for the Seventh

Circuit, was used by the patentee in the Air-Brake case, where it was argued that he was the first to effect the new function and result of "admitting train pipe air directly to the brake cylinder" by the shifting of a valve into open (or operative) position through the medium of the extreme traverse of the piston (see bottom of page 560 of Report), this Court saying:

> "A construction is given by complainants and the Circuit Court, to the second claim, which eliminates the mechanical features described, and one which could be supported only on the theory that the claim was for a method or process."

So here, the construction contended for by the plaintiffs eliminates all the mechanical features described in the patent and its claims and attempts to identify plaintiff's "improvement," only by the function of its automatic tripping of the lever and not by the particular mechanical elements which enter into the assembly. In the Westinghouse case, the great utility and primary character of the patented device were elaborated upon and made much of; replying to all of which this Court said (page 569):

> "But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no particular value. To say that the patentee of a pioneer invention for a new mechanism is entitled to claim every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent the function."

Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 1903, involved the Kitselman patent No. 346,322, granted Jan. 8, 1887, on a wire fabric machine. The case originated in the United States Circuit Court for the Northern Dis-

trict of Illinois; and was taken by a writ of certiorari t
this Court. The case turned in each of the Courts, upo
the question whether the defendant's machine infringe
the Kitselman patent; the defendant's machine having bee
made and used under the later Whitney patent No. 502,02
of Dec. 24, 1895.

This question of infringement turned in each of th
Courts, upon the question whether the Kitselman pate
was a primary patent or a secondary patent; each of th
Courts holding that, if it was a primary patent it was e
titled to a construction broad enough to cover the Whitn
machine; but if it was a secondary patent, it was not e
titled to such construction. The lower Court held that th
Kitselman patent was not a primary patent; and therefo
that Court decided the question of infringement in the neg
tive. The Circuit Court of Appeals held that the Kitse
man patent was a primary patent; and therefore decide
the question of infringement in the affirmative.

Having found that the Circuit Court in which the ca
originated was right in holding the Kitselman patent to
a secondary patent and not a primary one; this Court,
speaking of the comparative character of the Kitselma
machine and of the defendant's machine, announced i
agreement with the Circuit Court in the conclusion that

> "the machines lack that identity of means and ide
> tity of operation which must be combined with ide
> tity of result to constitute infringement." 189 U.
> p. 24, lines 13 to 16.

In *Cimiotti Unhairing Co. v. The American Fur Ref*
ing Co., 198 U. S. 399, 1905, decided May 15, 1905, the la
paragraph of the syllabus reads as follows:

> "Where, the patent does not embody a primary i
> vention, but only an improvement on the prior art, t
> charge of infringement is not sustained, if defendan
> machine can be differentiated."

The language of the decision itself on this point of law reads as follows:

> "Where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained," 198 U. S. 414, lines 19 to 22.

In the later instructive decisions of this Court enumerated on page 25, *ante,* of this brief, there has been no departure from the foregoing rules, and it is believed, speaking with the utmost respect, that the Court of Appeals for the Seventh Circuit erred in holding plaintiffs narrow, limited, secondary patent was infringed by defendant's entirely different patented device.

We submit that the Court of Appeals for the Seventh Circuit failed to apply to the Winters & Crampton patent and its relation to the fasteners of the prior art and to the defendants alleged infringing fastener, the definite and well settled principles of Patent Law, which this Court has established in the foregoing decisions dealing with the questions of validity, construction and infringement of Letters Patent.

It is fundamental that the essence of a patented invention is to be looked for and found in the *"thing,"* whether it be a machine, an article or a process, which is described in the specification of a patent, and that the claims are but the definitions of that alleged invention. They must be read in view of the "thing" that was new and no mere phraseology can expand their scope beyond that which was in fact the real invention, if any, disclosed in the patent. This principle is completely neglected by the Court of Appeals for the 7th Circuit which seems to treat the claims in issue in the Winters and Crampton patent in suit as utterly disassociated from the invention, if any, and even from the device shown and described in that patent. It overlooks the vital distinctions between defendants fastener and the fastener of the patent in suit and ignores the requirements in the Winters & Crampton specification and

the limitations, wherein the top arm of the lever must ride over the top edge of the keeper which, we respectfully submit, must be imposed on the claims.

Another fundamental principle, which that Court overlooked, is that a patent must be construed with reference to those devices which were known and used or patented or disclosed in printed publications prior to the date of the alleged Winters & Crampton invention, and that when so construed, the patent and its claims should be compared with the defendant's structure to ascertain whether the invention, *which was actually made by the patentees,* has been taken by the defendant.

The Court of Appeals for the Seventh Circuit said near the bottom of page 140 of the Sanitary Record:

> "Appellant's keeper, though supplied with 'a head formed with upper and lower curved outer sides coming substantially to a point' does not, as in the patent in suit, make use of the curved upper sides to direct the movement of the latch when the door is shut. If the arm on its lever extended a little further it would contact with the upper curved outer side portion of the head of the keeper."

The first sentence is a correct statement, but the second shows a serious misconception of the actual facts set forth in the record and of the mechanical operation of the defendant's Dent or Sanitary device.

In the first place, there is no arm on the top of defendant's lever in the sense that the term is used in Winters & Crampton's patent. There is present an offset, inclined, short radius cam, and if this cam be extended "a little further" it would not contact with the upper curved edge of the keeper, but it would hit the apex of the triangle at the nose of the keeper and would wedge the latch lever so that it could not lock.

At the top of page 141, the Sanitary Record, the Court says:

> "Concede the existence of claims that are narrow and restricted to structural design only, yet even in such claims there must be some range of equivalency."

This we submit is an error and is not in harmony with the many decisions of this Court, among which the following may be cited:

In *Computing Scale Company v. Automatic Scale Company*, 204 U. S. 609, this Court said (p. 621):

> "Conceding that this spiral rod and its connections with the cylinder in the manner and for the purposes stated is a novel feature in the combination and entitled to protection, it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor. The distinction between pioneer inventions permitting a wide range of equivalents and those inventions of a narrow character, which are limited to the construction shown, has been frequently emphasized in the decisions of this Court."

In *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, this Court said (p. 261):

> "It clearly appears that Boyd was not a pioneer in this department of machinery. Many inventors had preceded him, and many patents had been issued for improvements in hay-carriers in form and purpose similar to those described in Boyd's specification. We think the case is one where, in view of the state of the art, the patentee is only entitled, at the most, to the *precise devices* mentioned in the claims."

In *Blake v. San Francisco*, 113 U. S. 679, this Court said (p. 681):

> "The evidence shows that Bailey was not the first to conceive the idea of a device for opening or closing rigidly an automatic valve. The same thing had been done by means of wedges and screws and other devices. *He cannot, therefore, cover by his patent all the devices for producing this result, no matter what their form or mode of operation. The claim must be confined to the specific device described in the specifica-*

tion and claim, namely, a pin-hole and pin. If this construction of the claim be adopted, it is clear that no infringement is shown."

This Court in its many decisions referred to and applied in *Westinghouse v. Boyder Power Brake Co.,* 170 U. S. 537, 658, referred to, *supra,* has pointed out that infringement does not necessarily follow because the language of the claim as a matter of words can be read upon a defendant's structure, but that substantial likeness in character and mode of operation are essential to infringement. Such considerations the Court of Appeals for the Seventh Circuit absolutely ignored.

POINT E.

THE CLAIMS OF THE WINTERS & CRAMPTON PATENT ARE FURTHER LIMITED BY THE CONCLUDING WORDS "Substantially as described." (Sanitary R. p. 72.)

Each of the plaintiffs' claims concludes with the words "substantially as described." It has been held in a long line of cases that where a patentee deliberately concludes and limits his claims to a structure "substantially as described" or "substantially as set forth," these words limit such a claim to the specific combination of elements described.

"Substantially as set forth" are words of limitation in a claim which limit the combination to the elements described, *Pope v. Gormully,* 144 U. S. 248.

In *Singer v. Cramer,* 192 U. S. 265, 48 L. Ed. 437; 24 C. T. 291, this Court said:

"To prevent a broadening of the scope of the invention beyond its fair import in the light of the circumstances surrounding the issuance of the patent, the words of limitation contained in the claim must be given due effect, and, giving them such effect, the state-

ment in the first claim of the elements entering into the combination must be construed to refer to elements in combination having substantially the form and constructed substantially as described in the specification and shown in the drawing."

This rule has been applied in the lower Courts in the following cases:

Fox v. Perkins, 52 Fed. 204; 3 C. C. A. 32;
Reed v. Golove, 61 Fed. 958;
Brill v. St. Louis, 90 Fed. 666; 33 C. C. A. 213;
Simons v. Hathorn, 93 Fed. 958, 36 C. C. A. 24;
Carnegie v. Brislin, 124 Fed. 213; 59 C. C. A. 651;
Rose v. Dowden, 157 Fed. 681, 85 C. C. A. 449.

Defendant's fastener has no structure "substantially as described" in Winters and Crampton's claims.

POINT F.

THE SANITARY AND DENT DEVICES, WITH THEIR SHORT RADIUS CAM CONSTRUCTED UNDER PATENT NO. 1,575,647, ARE STRUCTURALLY DIFFERENTIATED FROM THE WINTERS & CRAMPTON PATENT BY LANGUAGE APPROVED BY THE PATENT OFFICE, AND DO NOT INFRINGE.

The defendant's device was made by the Dent Hardware Co., defendant in No. 547, and was sold to the Sanitary Refrigerator Co., defendant in No. 128. It is constructed as seen in defendant's patent No. 1,575,647 (Sanitary R. p. 125), and comprises a keeper of an entirely different construction and a latch lever of an entirely different character from the plaintiffs'. The plaintiffs' keeper, as we have tried to make clear, is old. The **top edge** of the plaintiffs' keeper trips the plaintiffs' latch when standing vertical. **The top edge of defendant's keeper has no function whatever.** As seen in Fig. 3 of the defendant's patent No. 1,575,-647, facing next page, defendant's keeper has a lateral

yellow pin b^6, which is adapted to contact with the offset cam c^1. (See Fig. 4 of defendant's patent.) The upper edge of defendant's keeper has no co-action whatever with the latch. The defendant's lever has no arm corresponding to the right-angled arm 12 of the plaintiffs' patent 1,385,102. Instead, defendant has an offset, obliquely arranged cam face c^1 which co-acts with the lateral pin or lug b^6 projecting from the inside wall of the keeper. While defendant's patent No. 1,575,647 was pending in the Patent Office, the Patent Examiner, with entire propriety, cited the plaintiffs' patent in suit, No. 1,385,102. A disclaimer was accordingly inserted, at the bottom of page 2, lines 57 to 74, of defendant's patent (Sanitary R. p. 127), reading as follows:

> "I am aware of patent No. 1,385,102, dated July 10, 1921, and I disclaim the structure therein disclosed, as my invention is differentiated therefrom, since whereas the structure disclosed in said patent utilizes a pin 12 carried by the latch arm 1., which co-acts with an upper cam edge 18 of the keeper in the upper member 17, in my novel construction, my keeper plate b^3 has no function, but the pivotal latch c^6 carries a cam c^1 inclined to the pivot of said latch and adapted to co-act with a pin b^6 carried by and laterally projecting from the inner wall of the keeper plate b^3 thereby to swing the terminal tongue of the latch into the horizontal locking position; and to none of the constructions of the prior art do I herein make claim."

It, therefore, clearly appears that the Patent Office was fully appreciative of the fact that defendant's construction was structurally and functionally different from plaintiffs' patent and structure, and defendant's patent was accordingly allowed.

DEFENDANT'S SHORT RADIUS CAM.

If the Court will look at the various Schrader patents owned by the Dent Hardware Co. and issued in the year

March 9, 1926. 1,575,647

T. O. SCHRADER

LOCK DEVICE FOR REFRIGERATOR DOORS

Filed June 30, 1925

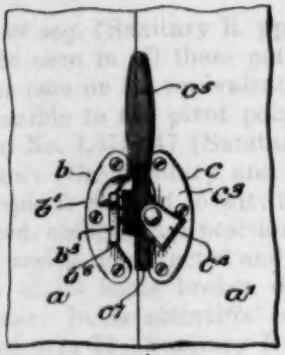


Fig. 1.

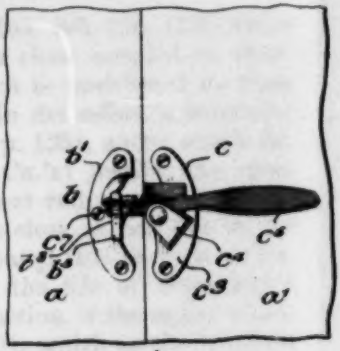


Fig. 2.

Fig. 3.

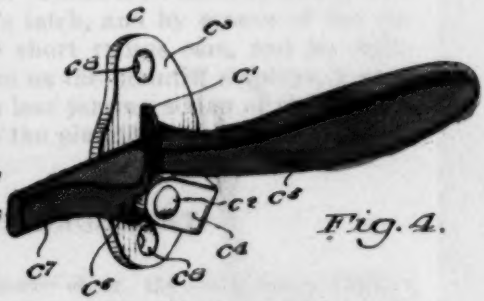


Fig. 4.

Fig. 5.

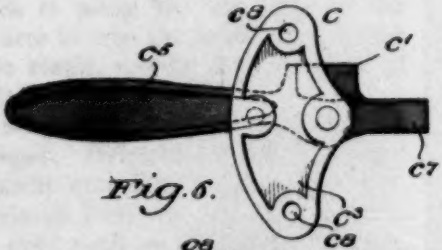


Fig. 6.

Fig. 7.

Fig. 8.

Inventor
Thomas O. Schrader
By Middlebrook & Fowler
Attorneys

March 9, 1926.

T. O. SCHRADER

LOCK DEVICE FOR REFRIGERATOR DOORS

Filed June 30, 1925

914, *et seq.* (Sanitary R. pp. 99, 103, 105, 116, 119), there ill be seen in all these patents a close coupled or short adius cam or its equivalent, which is positioned as close s possible to the pivot point. In defendant's Schrader atent No. 1,575,647 (Sanitary R. p. 125), under which de- endants (the Sanitary and Dent Co.'s) justify, the same rinciple is present to wit: the short radius or the closely oupled, oblique cam positioned as close as possible to the ivot and so constructed and collocated that there is no lia- ility of its being broken during the life of defendant's astener. In the plaintiffs' construction, if the upper right- ngled arm 12 (Sanitary R. p. 70), which is the weakest art of the whole contrivance, breaks or fractures, then laintiffs' latch is useless. There is no liability of any such ction in the defendant's latch, and by reason of the em- loyment of the oblique short radius cam, and no right- ngled elongated top arm as the plaintiff employs, a more quable movement and a less jarring action of defendant's atch is attained than in the plaintiffs' device.

NO INFRINGEMENT.

As we have tried to make clear, the only novel feature, any, in plaintiff's latch is using the top edge of the eeper to kick the upper arm to trip the latch lever, which ffects no new function or result, merely the old result of he lever tripping when it hits the keeper.

Defendant's lever has no part which ever contacts with he upper edge of its keeper. Defendant's offset oblique am contacts with an inwardly extending lug on the keeper, hich is entirely disassociated from the top edge thereof. laintiff's claims do not even read on defendant's device, or is defendant's device a reversal of any parts of plain- iff's patent, as they attempt to show in the mongrel draw- ng at the bottom of the plate facing p. 29 of their brief. his mongrel which they call "Defendant's latch" resem- les nothing made by defendants or anyone else. Defen- lant has no keeper of the contour portrayed or conical pin

as shown in the mongrel and what they call an "oblique cam" appears to be merely a flat plate coincident with the handle. It is doubtful, if the mongrel would work or lock at all since, as shown the stub plate at the top of the handle, would hit the conical pin and stop. If the defendant's structure is tortured or metamorphosed into being a reversal of plaintiff's then by the same token, plaintiff's latch is a mere reversal of the Charles latch discussed on page 21, *ante*. As defendants **have no lever with a top arm riding on the top edge of the keeper**, it is submitted there is no infringement, as was found by the Circuit Court of Appeals for the Third Circuit. (Exhibit 1, attached hereto.)

POINT G.

THE GRANT TO THE DENT HARDWARE CO. OF PATENT NO. 1,575,647, COVERING THE SANITARY AND DENT DEVICES (SANITARY R. p. 126), CREATES A PRESUMPTION THAT THERE WAS A SUBSTANTIAL DIFFERENCE BETWEEN PLAINTIFFS' AND DEFENDANT'S LATCH.

At this point, we desire to call attention to a rule of law, as enunciated by this Court, to the effect that where a defendant justifies under a patent, as defendants (Sanitary and Dent) do here, the issuance of such patent to a defendant raises a presumption in its favor, a presumption that there are clear structural differences and that it has, *prima facie*, a right to manufacture or use its own patented device, as well as the plaintiffs have a right to manufacture theirs. This is particularly so, where the patent under which defendant operates is not obviously an improvement upon plaintiffs' patented machine, does not obviously take plaintiffs' machine as a foundation or starting point, but, as here, is an improvement upon the expired Dent, Keil and Charles patents. This rule is so well established that we deem it unnecessary to do more than cite some of the cases wherein it was applied, to wit: *Corning v. Burden*, 15 How. 271; *Miller v. Eagle Mfg. Co.*, 151 U. S. 208; *Boyd v. James*-

ville Hay Tool Co., 158 U. S. 261; *Kokomo v. Kitselman*, 189 U. S. 8; and in the lower courts in *Bates v. Keith*, 82 Fed. 102, and *Boyden v. Westinghouse*, 70 Fed. 816; *Tool Co. v. Tool Co.*, 123 Fed. 894, and *Winters v. Dent*, 20 Fed. 2d 671.

In view of the above decisions, we are entitled to insist that weight should be given to the fact that defendant's device is also patented. If the Court will read the claims of the Schrader patent No. 1,575,647 (Sanitary R. p. 127), under which defendants justify, it will be evident that the Patent Office has allowed excellent claims exactly descriptive of defendant's structure, and this notwithstanding the existence of plaintiffs' patent. We, therefore, ask that defendants be given the benefit of this presumption which this Court in the above-cited cases says a defendant is entitled to.

Another way of stating the rule is that where a defendant has a patent, the presumptions of patentability are balanced and prior and subsequent patentees stand in equilibrio. Judge Hazel thus stated the rule in the middle of page 894, 123 Fed. in the case of *American Pneumatic Tool Co. v. Phila. Pneumatic Tool Co.*, 123 Fed. 891, wherein said the Court:

> "Moreover, it must not be overlooked that the defendant is manufacturing its tool, which has gone into general use, under a subsequent patent, to the issuance of which no objection was made by the Patent Office. The cases hold that, where a defendant constructs his invention in accordance with a patent held by him, the presumptions of patentability are balanced, and prior and subsequent patentees stand in equilibrio."

We are making no contention generally that the grant of a patent to a defendant gives such defendant the right to infringe an earlier patent of a plaintiff. We do, however, insist that mechanical patents are granted upon structures or differences in structures, and as this Court, in *Kokomo v. Kitselman*, 189 U. S., near the conclusion, said:

"Considering the complainants and Whitney as

alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. *The presumption from the grant of the letters patent is that there was a substantial difference between the inventions.*"

In the instant case, the Patent Office has done far more than merely grant patent No. 1,575,647, under which defendant justifies. It has permitted and, in addition, approved in lines 57 to 74 of page 2 of said patent (Sanitary R. p. 127), a succinct and accurate statement of the points of difference in the rival latches.

POINT H.

THAT THE CORRESPONDING PARTS OF THE RIVAL LATCHES ARE NOT INTERCHANGEABLE, IS AN IMPORTANT TEST IN DETERMINING INFRINGEMENT. (*Miller v. Eagle Mfg. Co.*, 151 U. S. 186.)

If we lay plaintiffs and defendant's drawings side by side, and substitute the plaintiffs' keeper for defendant's, or vice versa, it will be manifest that either structure would be inoperative. If we should substitute the plaintiffs' latch lever for the defendant's, or vice versa, it will be apparent that such a latch structure would be inoperative. (Dent R. p. 67.) This is a good working rule by which to determine infringement, as it has been held in numerous cases that where the corresponding parts are not interchangeable, it tends strongly to negative infringement. This rule has been applied in the lower courts as follows:

"It is held that non-interchangeability of parts in a machine tends strongly to negative infringement, Miller v. Eagle Mfg. Co., 151 U. S. 186; 14 Sup. Ct. 310; 38 L. Ed. 121; Pittsburg Meter Co. v. Pittsburg Supply Co., 109 Fed. 644, 48 C. C. A. 580. Neither is the fact that the alleged infringing device may effect the same result always determinative of infringement. Water-

Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024; Westinghouse v. Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. In the latter case, the Supreme Court said: 'But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no special value' (123 Fed. 896)."

In *Boyer v. Cleveland Pneumatic Tool Co.*, 185 Fed. 808, the Court of Appeals for the Sixth Circuit, applied the rule in the following language at the conclusion of its opinion on page 810:

"Moreover, the mechanism of the two hammers is not interchangeable and non-interchangeability is an important test in determining the question of infringement. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121. The defendant's hammer may accomplish the same results as complainant's, but it does not accomplish them by substantially the same or similar means, and consequently does not infringe."

POINT I.

IN A DOUBTFUL CASE, THE FACT THAT A PATENTED ARTICLE HAS GONE INTO USE IS NOT CONCLUSIVE OF ITS UTILITY, MUCH LESS OF ITS PATENTABLE NOVELTY.

The plaintiffs, in their brief on pages 41, 43, 44 and 60, make a great many reckless statements about how plaintiffs are doing 90% of the latch business, and how the defendants have abandoned the prior latches. In a realization of the weakness of their position, they attempt to bolster up their patent by extravagant and unwarranted statements as to commercial success. The only testi-

mony on these points, is from a single, solitary witness (one of the plaintiffs, Mr. Crampton), whose testimony is wholly uncorroborated, is mostly hearsay (Dent R. middle of pp. 44 and 46), and Crampton, further, refused to produce any of his books of record to support his wild and fantastic assertions. (Dent R. pp. 47 and 48.)

Crampton's statements that the Condit and Conroy latches were the only two on the market when he got up his contrivance, and that the majority of the Dent Hardware Co.'s locks did not automatically lock when the door slammed shut (Dent R. p. 19), are absolutely untrue. (See Dent R. pp. 20, 21 and 22.) The statements in the concluding pages of their brief as to the Dent Co.'s "abandoning" their standard lines, which they have made by millions for the last quarter of a century, are equally without warrant and at variance with the proofs.

Mr. Dent says that (Dent R. p. 27) plaintiffs' business with the patented latch amounts to only about 30% of the latch business, if it does that. There is no foundation for the plaintiffs' untruthful, loose and vague assertions that the plaintiffs' latch has superseded all other or a majority of the latches on the market, or that the plaintiffs' and defendant's latches here involved constitute the majority of latches on the market (Dent R. p. 26), or that defendants have abandoned the dozen or more latches they have made by millions during past years and are still making to make the latch in dispute (Dent R. p. 22), as a great many refrigerator manufacturers prefer a latch having a spring in it rather than a gravity operated latch, as the spring latch is more positive. (R. top p. 50.)

It is not apparent that this item of alleged use has any bearing upon any question before this Court. It is only in an unusual case that the fact of commercial success is entitled to any consideration on the question of patentability. Even in these unusual cases it must be shown that the commercial success enjoyed by the patented article was due to the patented features thereof rather than to an aggressive sales policy and extensive advertising on the part of the owner of the patent. There is no proof in this record tending to show that any alleged success which has been

enjoyed by plaintiffs is due to the features covered by the claims in suit, or that the feature of the top edge of the keeper actuating the top arm of the lever contributed to the sale of a single fastener.

In the familiar case of *McClain v. Ortmayer,* 141 U. S. 419, 428, the commercial success of the patented device was urged as evidence of the patentability of certain differences between the patented device and the prior art. In discussing this matter, this Court said, in part:

> "That the extent to which a patented device has gone into use is an unsafe criterion, even of its actual utility is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market and large commissions to dealers, as by the intrinsic merit of the articles themselves. While this Court has held in a number of cases that in a doubtful case, the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that; much less of its patentable novelty."

This Court, subsequently, in affirming the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Thompson Spot Welder Co. v. Ford Motor Co.,* 44 S. Ct. Rep. 533-536, quoted with approval the following statement by the Court of Appeals:

> "It follows, in our opinion, from what has been said, that the effect of the great commercial success of the Hermatta invention in the hands of plaintiff is entitled to little weight upon the question of invention, even were that question otherwise in doubt, which we think it is not."

The foregoing rule has been applied in many other cases such as the following, which are so familiar to this Court that we shall not quote therefrom.

Grant v. Walter, 148 U. S. 547, 556, 37 L. Ed. 552, 557, 13 Sup. Ct. Rep. 699;

Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 224, 37 L. Ed. 707, 710, 13 Sup. Ct. Rep. 850.

GENERAL SUGGESTIONS.

All patents are addressed to those skilled in the art to which they appertain or to those skilled in the nearest analogous art. Let us assume that we gave the Winters & Crampton patent to men skilled in mechanics, in the reading and understanding of specifications and drawings, and in the construction of small hardware, as refrigerator latches or fasteners. Let us suppose, in fact, that the men to whom we gave this Winters and Crampton patent were acquainted with the construction and operation of the patents, which had been issued prior to the issuance of the Winters & Crampton patent in suit, and directed them to manufacture the invention which they found in this Winters & Crampton patent following the instructions conveyed to them by its specification and drawings when read in view of their knowledge of the prior art. Is it reasonable to suppose that these men, or that any of them, following the instructions and directions thus given them, and seeking to embody in physical form the invention of the Winters & Crampton patent, would produce the defendant's fastener, or anything that looked like or resembled the defendant's fastener? The statement of the questions shows that it would be preposterous to expect that they would produce the Dent or Sanitary fastener or anything like it, and yet, there can be no infringement unless those skilled in the art, by following the directions of the patent in suit, and without the exercise of invention on their part, can produce the defendant's fastener.

We, therefore, submit that no one, skilled in the art and guided and directed by the Winters & Crampton patent, could by the exercise of mere mechanical skill produce the defendant's fastener. This, we submit, affords a decisive test of the question of infringement. Before the Court can say that there is infringement it must be evident that the defendant's fastener could have been made from the Winters & Crampton patent sued on without further direction or instructions. Even if the claims of the plaintiffs' patent

are readable upon the defendant's fastener, it does not necessarily follow that the latter is an infringement as was held in the familiar *Air Brake Case,* 170 U. S. 537, since there can be no infringement unless the defendant's construction, as a structure or mechanism is the same, or substantially the same as the plaintiffs' structure. On this point, said this Court:

> "An infringer of a patent, even if it is a pioneer patent, must do something more than reach the same result; he must reach it by substantially the same or similar means."

Applying this rule to the instant case, it is urged (a) that the patent in suit is not a pioneer patent, and (b) while the defendant's device reaches the same result as plaintiffs's and for that matter all the prior art refrigerator fasteners, to wit, the automatic locking of a door when it is slammed shut, it does not do it by "substantially the same or similar means."

Practically all the refrigerator latch patents in this record effected an automatic locking of the door in no matter what position the latch may assume, and in view of the Dent, Keil and Charles patents alone, not to mention the others, in the year 1921, at the date of the patent in suit there was absolutely no warrant in this ancient art for a broad patent controlling the automatic locking of a latch lever in its vertical or horizontal position.

CONCLUSION.

There can be no reasonable contention made by plaintiffs that defendants' (Sanitary and Dent) fastener copies in any respects the features of the fastener of the Winters & Crampton patent in suit, except in such particulars as are a common mechanical inheritance from the entire prior art to which Winters & Crampton added nothing of value which was not already available in many forms.

We submit that the fundamental similarities between the defendant's fastener and those of the prior art and the

striking differences between the defendant's fastener and the fastener of the Winters & Crampton patent in suit can not be ignored. They necessarily lead to the conclusion that the defendant's Sanitary and Dent fastener is not an infringement of the Winters & Crampton patent, even if it is valid, which we deny.

We respectfully submit that the reasoning and conclusion of the Court of Appeals for the Third Circuit, following the views of Judge Dickinson, rather than those of the Court of Appeals for the Seventh Circuit, will find favor with this Court, and that in both cases there should be ordered a decree dismissing the bill with costs.

Respectfully submitted,

E. HAYWARD FAIRBANKS,
Counsel for Sanitary Refrigerator Co. and Dent Hardware Co., Defendants.

EXHIBIT 1.

(28 Fed. 2d 583.)

In the
United States Circuit Court of
Appeals
For the Third Circuit

—

No. 3727. October Term, 1927.

—

Alexander F. Winters and Basil R. Crampton,
Appellants,
v.
Dent Hardware Company,
Appellee.

—

Appeal from the District Court of the United States for the District of Pennsylvania.

—

(Filed October 4, 1928.)

Before Buffington, Woolley and Davis, Circuit Judges.

—

Davis, Circuit Judge.

This is an appeal from a decree of the District Court dismissing the bill of complaint charging the defendant with infringing United States Letters Patent No. 1,385,102 issued to Alexander F. Winters and Basil R. Crampton July 19, 1921. All seven of the claims were alleged to have been infringed. The Court held claims 1, 2, 3, 4, and 7 to be valid but not infringed and claims 5 and 6, which plaintiffs sought to withdraw, invalid.

The appellants brought suit against the Sanitary Refrigerator Company for the infringement of the patent in question in the United States District Court for the Eastern District of Wisconsin. That court held all seven claims valid and infringed. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. There, the patentees conceded that claims 5 and 6 were invalid and the appellee here concedes that the other claims are valid if limited to the specific structure disclosed, and when so limited, it says it does not infringe.

Claims 1 and 7 are typical. They disclose in combination a door, a casing or joint, a keeper attached to the casing and a latch lever attached to the door rather than to the casing.

The patentees proceeded upon the assumption that latch levers of this general type in the prior art were all attached to the casing and that one of the novel disclosures in their patent was the transposition of the latch from the casing to the door and the keeper from the door to the casing. They say in their specifications:

> "The swinging lever latch, or as it is better known, the Condit latch, is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to an upper vertical position, and coming down across the meeting edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but is relatively hard to operate due to its attachment to the casing instead of the door, and the same is liable to drop to horizontal position in which case the door cannot be closed without first raising the lever to upper vertical position while, many times, the door is inadvertently swung toward closed position and against the lever in its horizontal position with injury either to the lever or door or both. In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing

when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other. . . . The mounting of the lever on the door is of value as use of one hand only is necessary for unlatching and drawing the door open. The ability to close the door and latch it automatically, irrespective of the position of the latch lever insures against injury to the latch or door and also insures that the door will be latched when it is swung shut."

The patents, however, to Keil, No. 564,448; to Dent, No. 670,506; to Schrader, Nos. 1,117,709 and 1,170,685, and to Ward, No. 1,250,736 show latches on the door and keepers on the casing. So there is nothing new in the transposition by the patentees of the latch from the casing to the door. Neither is there anything new or novel in the door or casing as such. Patentable novelty, therefore, must be found, if at all, in the particular form or function of the keeper or latch or in both.

The keeper in the Keil patent is strikingly similar in both form and function to that of the patent in suit. In Keil, the keeper has a base attached to the casing by three screws. From this base a post extends outwardly for a short distance and terminates in a triangular head, which on the under side extends downwardly for a distance below the lower edge of the post. The head of the latch is the apex of the triangle. The two sides terminating in the head are practically straight while those of the patent in question are somewhat curved. From the apex of the keeper, when attached to the casing, one of the triangular sides extends upwardly and the other downwardly. The inner or lower side is cut upwardly and somewhat inwardly at a slight angle to the vertical, forming a wedging cam. This meagre description reads equally well on the keeper of either the Keil patent or the patent in suit.

The function of every part of the Keil keeper is practically identical with that of the keeper of the patent in question. One or the other of the arms of the latch lever of the Keil latch slides down on the lower triangular side of the keeper when the door is being closed. Which one of these

two arms contacts with this lower side depends upon the position in which the latch lever is when the door is closed. The function performed by the plaintiffs' keeper and the Keil keeper in cooperation with the latch levers is the same function performed by keepers generally in the prior art patents. Only one of the sides of the Keil keeper, however, engages the arms of the latch lever and serves as a cam to direct the lever when the door is closed, but this is due to the design of the arms of the levers, and not to difference in principle of operation.

The next question concerns the latch lever. Judge Evans in construing this patent in the Circuit Court of Appeals for the Seventh Circuit said that, "patentable novelty resides in the structural differences of the latches (either in the keeper member or latch member or both)." The latch lever of the patent is about four inches long. A pin is run through the lever about one inch from the end which engages the keeper. This serves as a pivot or fulcrum. This latch lever is really a handle having two right angled arms near the pivot. One is the extension of handle beyond the pivot and the other is at right angles to it. In operation one of these two arms "is engaged with an outer portion of the keeper when the door is moved to closing position to swing the lever from a vertical position to a horizontal and engage the other arm under the keeper, and the other (arm) of which is engaged with a different outer portion of the keeper when the door is moved to closing position and the lever is horizontal to run the lever upwardly toward vertical position or until said other arm passes under and engages with the keeper to hold the door closed." These general features and functions of latch levers were old in the art.

The lever in the Keil patent has the general features of the plaintiffs' lever. It will lock when the door is closed whether the lever is in a horizontal, vertical or an intermediate position, because of the cooperation of the two arms 4 and 5 of the lever latch with the keeper "to force the door tightly to" when it is shut. The keeper is mounted on the door casing just as in the patent in suit. The latch lever is pivotally mounted between its ends on the door.

One of the ends forms the operating handle and the other contains two arms one or the other of which engages the cam on the keeper when the door is closed.

The elements common to the devices of Keil and the plaintiffs are: a door, a casing, a keeper attached to the casing, a lever latch pivotally attached to the door, means on the keeper to engage the arms of the latch and means on the latch to engage with the keeper. The two arms of the engaging end of the Keil lever, however, are in the same parallel plane while the two arms on the plaintiffs' lever are at right angles, but both perform the same function, and this difference is one of design and not of principle of operation.

The Charles Patent, No. 702,185, issued June 10, 1902, shows a device having a latch lever corresponding in its essential features with the plaintiffs'. It has a handle portion which may stand in a horizontal, vertical or intermediate position. There are two arms on the other end, one extending beyond the pivot or fulcrum and the other substantially at right angles to it. The function of these arms, coacting with the keeper, is to fasten the door when it is shut and to hold it in a closed position. This latch considered as a design structure is somewhat different from the plaintiffs', but functionally both are substantially the same.

The function of the arms generally is to trip, or give a kick to the latch lever by the coaction of the arms with the keeper when the door is closed. The object of all these tripping devices, which are numerous and old in the art, is to fasten the door and hold it a closed position regardless of the position of the lever when the closing operation begins.

The art was crowded with latches that automatically lock when the door is closed when this patent to Winters and Crampton was issued. In addition to the patents to Keil and Charles, there are patents involving the same general features and functions to Dent, No. 670,506 (1900); to Schrader, No. 1,117,709 (1914), No. 1,170,685 (1915), No. 1,265,120 (1917); and to Ward, No. 1,250,736. In speaking for the Circuit Court of Appeals for the Seventh Circuit, Judge Evans said of the plaintiffs' patent:

"Whether the other claims (than 5 and 6 admitted to be invalid) are infringed depends entirely upon the position of the patent in suit in the art. No difficulty would be experienced in finding infringement if the patent were a pioneer or was one covering such an improvement as entitled it to a broad range of equivalency. But the patent does not occupy any such position. It is an extremely narrow one as a reading of the claims at once discloses. Moreover, the record shows a prior art loaded with latches possessing some of the features of appellee's latch . . . Patentable novelty, if any exists, is restricted to the particular structure disclosed . . . The precise question then is, does appellant avoid infringement by placing a lug on the near side of the head of its keeper, the surface of which is curved similarly to the outer surface of its head and which is adapted to contract with the arm projecting from the handle portion of its lever? Concede the existence of claims that are narrow and restricted to structural design only, yet even in such claims there must be some range of equivalency."

Counsel sought to withdraw claims 5 and 6, but Judge Dickinson declared them to be invalid. We have grave doubt as to the validity of the other claims, but if they are valid, their scope is clearly confined to the structural design disclosed.

The question then arises, does the defendant's device infringe the structural design which plaintiffs' patent discloses?

The defendant's device has a keeper attached to the casing of the door and a latch attached to the door, but they are quite different in design from the plaintiffs'. The defendant's keeper is old. It has an outstanding post and a head depending below the post and with upper and lower curved outer sides coming substantially to a point, but it has a lug on the near side of the triangular head. The plaintiffs' keeper does not have this.

The latch of the defendant has one arm formed with an under cam side extending from the pivot and adapted to be

engaged under the depending portion of the keeper, but its other arm is entirely unlike it in form. The arm contacts with the lug on the keeper and this causes the lever to swing and lock when the door is closed. The upper triangular side of this keeper performs no function when the door is closed. For anything that it does, it might as well not be there. It does not coact at all with the latch, but the same side in the plaintiffs' does.

Both the design and function of the defendant's latch and keeper are unlike those of the plaintiffs'. They cannot be said to infringe unless they come within the narrow range of equivalency of a design patent entering a crowded art. Structural design claims have some "range of equivalency," but that range must be as narrow as the invention itself. Is the lug outstanding from the head of defendant's keeper equivalent to the upper triangular side of the plaintiffs' keeper? It certainly is not in structure. It performs a similar function just as do the sides of many keepers of the prior art. Neither does defendant's latch have any arm corresponding in design to the upper arm of plaintiffs' latch. If the patent in suit were a pioneer patent and originated the trip or kick that locks the door when it is closed, then the defendant's device might infringe. The patent would be entitled to a broad construction and wide range of equivalency. But it came into an already crowded art with many patents having various devices involving arms, cams, lugs, projections, protuberances and all sorts of contrivances for holding the door in a closed position when it was shut.

The same range of equivalency here contended for by the plaintiffs, so as to include the defendant's structure, would bring plaintiffs' patent within the prior art and invalidate it. It seems to us that the choice lies between holding the plaintiffs' patent invalid for want of patentable novelty over the prior art or holding it valid but limited to the particular structure disclosed which does not include the defendant's device within its range of equivalency.

The purpose of the patent laws is to reward those who make some substantial discovery or invention which adds to knowledge and takes a step in advance in the procession

of the useful arts. It is not the object of those laws to grant a monopoly for every trifling device, every shadow or shade of an idea which would naturally and spontaneously occur to any mechanic skilled in the art. The patent laws never intended to lay such a heavy tax upon the industry of the country without seeing that some real contribution was made to the advancement of the useful arts. Atlantic Works v. Brady, 107 U. S. 192, 200. We think that the structure of the defendant's latch and keeper are so unlike those of the plaintiffs' that they do not come within the range of equivalency necessary to constitute infringement. With great respect we are constrained to reach a different conclusion from the Circuit Court of Appeals for the Seventh Circuit.

The decree of the District Court dismissing the bill because of non-infringment is affirmed.

Attest: A truly copy.

Clerk.

EXHIBIT 2.

20 Fed. 2d pp. 671-673.

WINTERS, ET AL. v. DENT HARDWARE CO.

District Court E. D. Penna. August 11, 1927.

No. 3999.

Patents 328—No. 1,385,102, for improved refrigerator door latch lever, held so far as valid to be restricted, to the particular construction, and not infringed.

Patent No. 1,385,102 for an improved refrigerator door latch lever, except as to claims 5 and 6, for a detached latch and keeper construction, which are held invalid for lack of novelty, held, in view of the prior art, to be restricted to the special construction, and not infringed.

In Equity Suit by Alexander F. Winters and another against the Dent Hardware Company. Decree for defendant.

Cyrus N. Anderson, of Phila., Pa., for plaintiffs.
E. Hayward Fairbanks, of Phila., Pa., for defendant.
Dickinson, District Judge.

This cause concerns letters patent No. 1,385,102, for an improved refrigerator door latch lever. The conclusion reached is that the claims of the patent (other than 5 and 6) should be so read as to restrict the right granted to the plaintiff's special construction, which the defendant does not infringe, and that claims 5 and 6 are invalid.

DISCUSSION.

The patent was held to be valid and infringed by decree of the United States District Court for the Eastern District of Wisconsin. Winters v. Sanitary Refrigerator Co. (no opinion filed). The parties were really the same as those before us, but the defendant here was not made formally a party to that proceeding. In consequence, the ruling is not asked to be deemed conclusive. An appeal from that ruling is pending. Were the question ruled in that case the question here raised, we would unhesitatingly follow it, because we are in full accord with the views expressed by Judge Geiger upon the feature of the patent which he discussed.

We have, however, a wholly different question here raised. The inventive feature and practical value of the plaintiff's latch is that, when the door is "slammed to," it will be automatically locked, whether the latch lever proper is in the position of pointing toward the door side or jamb side of the refrigerator. This result is accomplished by having two cams, respectively so placed as that one operates in one case and the other in the other. There is, as Judge Geiger has expressed it, not "the slightest doubt about the perfect identity of plaintiff's and defen-

dant's devices in a legal sense." This is because of the use of what may be called alternate or double cams in the construction of each device. If, however, this feature had already been appropriated by the prior art, then the only advance made by plaintiff's invention was in the special construction or position of his cam, and there would be no infringement, unless this special cam feature is copied. This the defendant has not done.

Upon the question of how much of the plaintiff's latch was an appropriation of the possessions of the prior art, Judge Geiger expresses no opinion. This question is now the only one. Cams to direct the latch to a locking position are "as old as the hills," as they followed closely upon the latch string. A real advance was made by the shifting of the latch lever from the jamb to the door. This feature differentiates many of the devices of the older art from those of the present. Another advance was made in what we have called the alternate (or, what is perhaps more accurately termed the double) cam feature. These two features in combination permit the door to be closed and locked by a slamming action whether the latch lever be in a vertical or horizontal position. If this combination did not originate with the plaintiff's patentee, the plaintiff and defendant each have the like right to a mere special construction.

This takes us to the claims of the patent and back to the prior art. Claims 5 and 6 are subject of special discussion, and will be here ignored. The scheme of the improvement outlined in the patent application is that of an advance upon the plan of the Condit latch. The main features are (1) a transference of the latch lever to the door; and (2) to assure the operation of the device, whether the latch lever be in a vertical or horizontal position when the door is slammed. The described structure is of a device which meets both these objectives, as does likewise the patented device of the defendant. Patentability and infringement are thus both present, unless these features are of "the oldest constructions in this art," and specifically as present in the Kiel, Dent and Charles patents.

It may be here interpolated that claims 5 and 6 of the

patent in suit are for a detached latch and keeper construction. There is a practical admission of the absence of novelty in these constructions aside from the applied features above mentioned, and claims 5 and 6 have been (at least attempted to be) withdrawn from the case. Whether they can be thus eliminated is in controversy. We mention this now, so that it may be clear that we are assuming the keeper and latch (considered as detached and independently) to belong to the prior art.

We wish also to reiterate that the question is not one of the validity of plaintiffs' patent, but the scope of the claims. There is in effect no denial of the right to the specific constructions described. Defendant could not well take any other position, because it also does business under the assumed protection of a like patent to its special construction. The distinction made has a controlling bearing upon the question of equivalents, and consequently upon infringement. The action of the Patent Office in rejecting claim 7 (as made in the original application) on the Ward and Kiel patents, and making no reference to the prior art bearing upon the other claims, as well as the subsequent allowance of the Schrader patent, make it manifest that the claims of the patent in suit were read and allowed as for a specific construction. The plaintiffs' application was filed December 7, 1920. Had the Condit device been a full expression of the accomplishments of the prior art at that time, as the application undoubtedly assumes, and as would seem to have been assumed throughout, there could be no doubt that the claims of the patent (other than 5 and 6) should be read so broadly as to give the patentee the full benefit of the doctrine of equivalents. Keil, however, as early as 1895 (letters patent No. 564, 448) Dent in 1900 (letters patent No. 670,506) Charles in 1901 (letters patent No. 702,185), Schrader in 1914 (letters patent No. 1,117,709) and again in 1915 (letters patent No. 1,170,685), Ward in 1917 (letters patent No. 1,250,736), and Schrader still again in 1917 (letters patent No. 1,265,120), all describe devices which, if after the patent in suit and if the claims of the latter are broadly read, would be infringements. There is in consequence no novelty in the features in respect to

which the patent in suit is asserted to be in an advance upon the Condit device, to wit, placing the keeper upon the door jamb, and the lever upon the door, and providing for the closing of the door without regard to the position of the lever.

We make this latter statement with confidence, because in the argument addressed to us this closing of the door with indifference to the position of the latch lever was asserted to be prevented in the devices of the old art solely by the fact that the lever latch was placed on the jamb. This leaves to the plaintiffs no exclusive right, except to the particular construction of their device. There can be no denial of the fact that this device has many merits. It is simple, of neat appearance, durable and effective, and in all these respects an improvement upon the latches before in use. Although the plaintiffs have exposed themselves to the charge of overstating the favorable reception given to this latch by the trade, we can well believe that it found a ready sale. There is likewise room for at least the suspicion that the defendant sought to "cut in" on the plaintiffs' trade by making a latch, in the druggist's phrase, "just as good," and that the differences in the two devices are only such as to make a difference in special construction. That there is such difference is evidenced by the findings of the Patent Office in granting a patent to each. We are here concerned only with plaintiffs' claim of right to a monopoly, and we hold that they have none, except to a latch of their own special construction, and this right our finding is the defendant does not infringe.

With respect to claims 5 and 6 a word must be added. It is a wise and general practice in patent cases to select the claims which, as the phrase goes are "in issue." All the claims of this patent were thus put in issue, and the defendant was at some pains and expense to answer to claims 5 and 6. It was not until the argument that the plaintiff sought to withdraw these claims. We will not stop to discuss any of the questions raised, but content ourselves with the finding that claims 5 and 6 are of no validity.

An appropriate decree in accordance with this opinion may be submitted.

EXHIBIT 3.

24 Fed. 2d 15

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1927, JANUARY SESSIONS, 1928

No. 3935

SANITARY REFRIGERATOR COMPANY, Appellant,
vs.
ALEXANDER F. WINTERS and BASIL R. CRAMPTON, Appellees

Appeal from the District Court of the United States for the Eastern District of Wisconsin

Before Alschuler, Evans, and Page, Circuit Judges

February 9, 1928.

EVANS, C. J.:

A patent, No. 1,385,102, to Winters and Crampton issued July 19, 1921, covering a latch, was the basis of the instant suit. Seven claims are involved, two of which (5th and 6th) are broad, generic claims, while the other five (1, 2, 3, 4, and 7) are narrow, specific claims.

The District Court sustained all claims and found appellant to be an infringer thereof. Thereafter appellees brought suit upon this same patent in the District Court for the eastern district of Pennsylvania and the court there held that claims five and six of the patent were invalid and the other five claims were not infringed by latches similar to the ones made by appellant.

Counsel, with commendable frankness, have made concessions in this court which greatly narrow the controverted

issues. Appellant admits the validity of claims, 1, 2, 3, 4, and 7, while appellees concede that claims 5 and 6 are invalid. The sole issue remaining, in view of these concessions, is one of infringement of the five valid claims. The concession that these five claims are valid was accompanied by the statement that validity was recognized only in view of an asserted construction which gave to each claim so narrow a field that infringement was not disclosed.

"This invention relates to a latch of the swinging lever type, particularly adapted for use on refrigerators though applicable in many other relations where a door is to be closed and held in closed position. The swinging lever latch, or as it is better known, the Condit latch, is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to an upper vertical position, and coming down across the meeting edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but is relatively hard to operate due to its attachment to the casing instead of the door, and the same is liable to drop to horizontal position, in which case the door cannot be closed without first raising the lever to upper vertical position while, many times, the door is inadvertently swung toward closed position and against the lever in its horizontal position with injury either to the lever or door or both. In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other. A further object of the invention is to construct a latch of few parts, whereby it may be economically made and which will be durable and efficient in service."

Two typical claims are one and seven, herewith quoted:

1. "In combination, a door and casing therefor, a keeper attached to the casing comprising a base, an outstanding

post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower curved outer sides coming substantially to a point and with an inner upwardly and inclined side, a member attached to the door comprising a base, an integral outstanding post projecting from the base and a laterally extending arm at the upper end of the post paralleling the base, and a latch lever pivotally mounted between its ends between the said arm and base of said member, said lever having one arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper, a handle portion extending in the opposite direction from the pivot and another arm projecting from the handle portion a distance from the pivot and lying substantially at right angles to the first arm of the lever and likewise being formed with an inner cam side, substantially as and for the purposes described.

7. "In combination, a door and a casing therefor, a keeper attached to the casing, a latch lever pivotally mounted on the door between its ends, one end of the lever being formed into an operating handle and the other into a keeper engaging arm, a second arm projecting from the handle portion of the lever a short distance from its pivot and at an angle to the first arm, said keeper being formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed, to automatically operate the lever so that it will engage under the keeper when the door is entirely closed, substantially as described."

While appellee conceded that claims five and six were invalid in view of the prior art, we would have no hesitancy in so finding in the absence of this admission.

Whether the other claims are infringed depends entirely upon the position of the patent in suit in the art. No difficulty would be experienced in finding infringement if the patent were a pioneer or was one covering such an improvement as entitled it to a broad range of equivalency. But the patent does not occupy any such position. It is an extremely narrow one as a reading of the claims at once

discloses. Moreover, the record shows a prior art loaded with latches possessing some of the features of appellee's latch.

Describing appellee's latch, counsel say:

"The latch is attached to the door of the refrigerator and the keeper for the latch is attached to the door jam. * * * The swinging latch of the patent in suit is an automatic latch acting to close and tightly close when the door is moved to shut it irrespective of the position the latch lever may have whether horizontal or level."

The prior art as disclosed by the Kiel patent No. 564,448, the Dent patent No. 67,506, and Charles patent No. 702,185, the Schrader patents Nos. 1,117,709 and 1,170,685, the War patent No. 1,250,736, all refute the contention of asserted novelty, in the location of the keeper upon the door jam and the lever upon the door or in providing for the automatic closing of the door without regard to the position of the lever. It may be true that in some of these disclosures because of the law of gravity the lever invariably takes but one position.

In the Dent patent the keeper was attached to the casing while the member carrying the latch lever was attached to the door. In the Charles latch the keeper was on the door while the other member was on the casing. The Kiel latch had its keeper on the casing and the latch member on the door. Each structure, examples of which are in evidence, works automatically when the door is slammed shut whether the latch lever is in a horizontal or a vertical position.

It follows, therefore, that a patentable novelty, if any exists, is restricted to the particular structure disclosed. What, then, is the novel structure?

In nearly all of the cited prior art structures, the keeper member has a curved post against which a portion of the level strikes when the door is swung. Patentees (Claim 1) describe this portion of the keeper as "an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower outer sides coming substantially to a point." The keeper described in the Kiel patent is decidedly similar. The differ-

ences between appellees' lever latch and the prior art structures are more pronounced. Automatic operation is dependent upon the cooperation of the latch and the keeper. Consequently there naturally follow differences in structural design of one member due to difference in structure of the other member. We repeat then that patentable novelty resides in the structural differences of the latches (either in the keeper member or the latch member or in both); that the claims are narrow and their validity is conceded. Our operation of the physical exhibits discloses a basis for the concession of validity. But it is this narrow field and nothing more which the inventor possessed when he secured his patent.

As thus analyzed, limited, and explained, are the claims infringed by appellant's latch?

Appellant's structure has a keeper and a latch member located similarly to the appellees'. But it contends that both its keeper and its latch member differ from those of the patent. Its keeper does not have (so it says) "an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower curved outer sides coming substantially to a point," nor does its latch lever have one "arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper." It supplies its keeper with a lug on the inner or door side and its latch lever is supplied with an arm extending from the pivot of the latch member, but such arm does not engage "the depending portion of the keeper." Rather is it so constructed and so angled as to come in contact with the lug on the head of the keeper. It is this contact between the lug and the arm on the latch which causes the latch to automatically swing and lock when the door is slammed. Appellant's keeper, though supplied with "a head formed with upper and lower curved outer sides coming substantially to a point" does not, as in the patent in suit, make use of the curved upper sides to direct the movement of the latch when the door is shut. If the arm on its lever extended a little further it would contact with the upper curved outer side portion of the head of the keeper.

The precise question then is, does appellant avoid infringement by placing a lug on the near side of the head of its keeper, the surface of which is curved similarily to the outer surface of its head and which is adapted to contact with the arm projecting from the handled portion of its lever?

Concede the existence of claims that are narrow and restricted to structural design only, yet even in such claims there must be some range of equivalency.

Perhaps the expression "range of equivalency" is not a happy one nor does it describe the thought as accurately as it should. Instead, it would doubtless be better to say that a valid claim should rarely, if ever, have its language construed with absolute literacy. While a valid, narrow claim will be strictly construed, it by no means follows that its terms and expressions should be limited to a hard and fast, unbending definition. Rather must the language of each claim be defined in the light of the meaning given it by the patentee, with an appreciation of the purpose and object of the element in the patented structure. To illustrate. Patentee speaks of a keeper with its base, its post, and its head. The latter member is described as having "upper and lower curved outer sides coming substantially to a point." In our effort to ascertain whether infringement occurred, we must define the head as well as the "sides of the head." Is the outside of appellant's lug a part of the side of the head of the keeper? Certainly it is a part of the head and, in the light of the mechanics of the entire structure, the purpose it serves, we conclude that it is a part of the *side* of the head.

The decree is modified in so far as it sustains the validity of claims five and six of the patent in suit and enjoins the infringement of said claims five and six and to the extent that appellant is directed to account for its gains and profits due to the infringement of said claims five and six. Otherwise the decree is affirmed. The cost in this court shall be divided equally between the parties.

EXHIBIT 4.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

In Equity

Alexander F. Winters and Basil R. Crampton
vs.
Sanitary Refrigerator Company

OPINION OF JUDGE GEIGER (Sanitary R. p. 35)

The Court: Speaking of combinations and testing out identity of co-action and result, there isn't the slightest doubt about the perfect identity of plaintiff's and defendant's devices in a legal sense. I am well satisfied to regard the Crampton patent as being an advance and as entitled to at least a range that will forbid the defendant's structure here. If upon this art it must be held that there was no room for invention, it is pretty hard to reconcile the success which the plaintiff's structure has had with the attitude of the defendant, which brings in a patent of its own here, in which patent it still asserts it is in an inventive field by introducing a slight modification over Crampton. I regard this as one of the cases in which, assuming that because of the condition of the art there may be debate upon the question of invention, the course of the plaintiff's structure in the art, the acceptance of it, can here be taken as furnishing strong support for the presumptive validity of the patent.

The plaintiff can take a decree upon that theory.